

# HOUSE ENERGY AND COMMERCE SUBCOMMITTEE CONVENES HEARING TO EXAMINE BIPARTISAN DATA PRIVACY BILL

## EXECUTIVE SUMMARY

On June 14, the House Energy and Commerce Subcommittee on Consumer Protection and Commerce held a [hearing](#) entitled “Protecting America’s Consumers: Bipartisan Legislation to Strengthen Data Privacy and Security.” Specifically, the hearing was convened to consider the comprehensive bipartisan American Data Privacy and Protection Act (ADPPA) ([section-by-section](#)), which was introduced by House Energy and Commerce **Chair Frank Pallone (D-NJ)**, **Ranking Member Cathy McMorris Rodgers (R-WA)**, and Senate Commerce, Science, and Transportation **Ranking Member Roger Wicker (R-MS)**.

There was definitive support among Democrats and Republicans for the bipartisan and bicameral spirit of the ADPPA, and many lawmakers expressed explicit endorsement of the bill. However, there was broad recognition among lawmakers and witnesses that the ADPPA must undergo many revisions before reaching a passable form. In particular, there are a few policy issues in the ADPPA that lawmakers and witnesses flagged as being necessary to address: (1) the amount of resources that should be provided to the Federal Trade Commission (FTC); (2) the scope of private right of action and federal preemption; (3) the relevant authorities being transferred from the Federal Communications Commission (FCC) to the FTC; (4) the actual knowledge standard used in the enforcement of children’s privacy and data protection provisions; and (5) various other technical issues within the text.

In addition to debate on the underlying legislation, there was extensive discussion on: (1) how the ADPPA strives to protect marginalized communities from algorithmic discrimination; (2) the bill’s stipulations on children’s privacy and data protection; (3) the ADPPA’s provision on data minimization and other consumer rights provisions; (4) the bill’s proposed regulation of data brokers; (5) enforcement by state attorneys general; and (6) small business compliance. Although discussed less extensively, the two key topics of the Health Insurance Portability and Accountability Act (HIPAA) and dark patterns were also mentioned.

## OPENING STATEMENTS

**Subcommittee Chair Jan Schakowsky (D-IL)** applauded the collaborative nature of the ADPPA, expressing her optimism at the prospects of the legislation getting passed. She argued that the legislation would protect consumers, provide certainty for businesses, and increase protections for children.

**Rep. Anna Eshoo (D-CA)** affirmed her commitment to pass legislation to secure user data, require companies to minimize personal data collection, and give users access to and control over their personal data. She pushed back against federal preemption being included in federal data privacy legislation and called for protections for small businesses. Although Rep. Eshoo did not explicitly endorse ADPPA during the hearing, she expressed interest in working in a bipartisan manner on the legislation.

**Ranking Member Gus Bilirakis (R-FL)** emphasized that the ADPPA is still undergoing revisions and urged feedback to remain constructive and cooperative. He remarked that the legislation works to strike a “delicate balance” between consumer data protection and fair rules for businesses. He called for sensitivity to small and medium sized businesses when considering rules. The legislation, he said, “threads the needle” on issues that have acted as barriers to bipartisan cooperation, such as federal preemption, private right of action, and the role of FTC. Rep. Bilirakis also highlighted the bill’s protections for children, including a ban on targeted advertising aimed at individuals under the age of 17.

**Full-Committee Chair Frank Pallone (D-NJ)** characterized the ADPPA as a “real chance” to pass comprehensive federal data privacy legislation. The bill, he explained, rejects the notice and consent system that has “totally failed” to protect consumers, and instead requires data minimization and establishes certain individual rights. Chair Pallone highlighted the bill’s provisions on discrimination, specifically its requirement that businesses conduct related impact assessments on their algorithms.

**Full-Committee Ranking Member Cathy McMorris Rodgers (R-WA)** alluded to the ADPPA’s federal preemption provision when she remarked that the bill ends the “unworkable” patchwork of state laws and provides certainty to consumers and businesses. Ranking Member Rodgers added that the bill targets bad actors while preserving useful innovations.

## **WITNESS TESTIMONY**

**Mr. Bertram Lee** ([testimony](#)), of the Future of Privacy Forum, urged Congress to move quickly as more states start to implement their own comprehensive data privacy frameworks. The ADPPA, he continued, is more comprehensive than state frameworks because it includes provisions on algorithmic discrimination, corporate accountability mechanisms, short-form privacy notices, individual redress, and privacy by design. Mr. Lee suggested that Congress make the following additions to the ADPPA: (1) additional funding for the FTC; (2) more space for iterative processes within the ADPPA so the bill can evolve with technology; and (3) more definitional clarity to make clear the ADPPA’s relation to other federal laws.

**Mr. John Miller** ([testimony](#)), of the Information Technology Industry Council, expressed optimism about the ADPPA’s bipartisan and bicameral efforts, but highlighted areas for improvement. First, Mr. Miller argued that the definition for sensitive covered data is “overly broad,” including the ADPPA’s supposed subjection of all online activity related to individuals to opt-in consent. Second,

he complained that the bill does not sufficiently distinguish between the different types of entities that utilize data and their responsibilities — particularly as it relates to the difference between data controllers and processors. Third, Mr. Miller voiced concern that the ADPPA's definition of targeted advertising would be harmful to ad-supported business models. Fourth, he urged lawmakers to reconsider inclusion of private right of action in the bill, arguing that enforcement from the FTC and state attorneys general are sufficiently robust. Finally, Mr. Miller questioned the bill's execution of federal preemption.

**Ms. Caitriona Fitzgerald** ([testimony](#)), of the Electronic Privacy Information Center (EPIC), asserted that self-regulation has been ineffective and pushed for a comprehensive national data privacy framework. She argued that the ADPPA would give consumers control over their personal data and draw power away from big tech companies by requiring data minimization. She was supportive of the bill but recognized that it will still require further work and negotiation.

**Mr. Doug Kantor** ([testimony](#)), of the National Association of Convenience Stores, highlighted “innovations” in the ADPPA, pointing to its articulation in statute of the various responsibilities of covered entities — which includes small businesses — and service providers. However, Mr. Kantor added that more could be done to clearly articulate these responsibilities in the bill. For example, he was concerned that sections 203 and 204 on consumer rights could be construed to place certain responsibilities on small businesses rather than large service providers. Mr. Kantor also contended that financial services companies that collect transaction data need to be covered by the bill to protect consumers. Finally, he was concerned with how a private right of action might interact with the bill's provision on pricing loyalty, which relates to customer loyalty programs.

**Ms. Jolina Cuaresma** ([testimony](#)), of Common Sense Media, pushed lawmakers to pass a bill that includes: (1) strong protections for minors; (2) data minimization; (3) robust enforcement; and (4) clear and conspicuous notice and consent requirements. The ADPPA contains “much needed” consumer protections, she said. Ms. Cuaresma outlined changes that she argued should be made to the ADPPA, including covering all minors, increasing FTC resources, and closing the loophole in the actual knowledge standard that allows companies to evade children's protection compliance.

**Ms. Maureen Ohlhausen** ([testimony](#)), Co-Chair of the 21st Century Privacy Coalition, described areas of improvement within the ADPPA. First, she observed that the bill would preempt the FCC's privacy and security authority with respect to broadband and video services but stops short of preempting its authority with respect to voice services. Second, she explained that while the bill replaces the FCC's authority with new FTC authorities, the language “far exceeds” the requirements of the Cable Act and equivalent protections in the Satellite Act. Third, Ms. Ohlhausen voiced concern that the bill creates uncertainty for routine operational uses of information. Lastly, she argued that the bill's exceptions to federal preemption could limit its application.

**Mr. Graham Dufault** ([testimony](#)), of ACT | The App Association, advocated for a federal privacy law to achieve two goals: (1) the requirements must be meaningful to enhance consumer trust in software-drive goods and services and (2) the bill must provide legal certainty to businesses. The

ADPPA achieves these goals, Mr. Dufault concluded. He then noted some areas that need further work while also drawing attention to bright spots in the bill. First, he stated that the safeguards on private right of action are helpful, but he urged lawmakers to further refine the language. Second, Mr. Dufault was concerned that the exceptions to federal preemption would make application by courts more complicated. Third, he highlighted the importance of the bill's authorization of FTC small business compliance programs. Fourth, Mr. Dufault applauded the ADPPA's balance on data minimization and consumer data rights.

**Mr. David Brody** ([testimony](#)), of the Digital Justice Initiative and the Lawyers' Committee for Civil Rights Under Law, remarked that passing the ADPPA would "significantly" advance individual freedoms on the internet. Mr. Brody overviewed strong provisions in the bill, such as the ADPPA's prohibition of discriminatory uses of data, its requirement that companies test their algorithms for bias, and its data minimization provision. However, Mr. Brody asserted that the bill's limited private right of action would "severely" curtail the ability of individuals to address violations.

## DISCUSSION AND QUESTIONS

### Private Right of Action and Federal Preemption

- **Rep. Brett Guthrie (R-KY)** asked how the ADPPA's limited private right of action would impact small businesses. Mr. Dufault warned against private right of action since, he argued, bad actors could take advantage of private right of action to target small businesses that are more likely to settle because they lack legal resources. Resultantly, Mr. Dufault emphasized the importance of certain safeguards around private right of action. Mr. Kantor echoed Mr. Dufault's concerns, particularly noting that the ADPPA providing for compensatory damages in private right of action could magnify compliance costs.
- **Rep. Fred Upton (R-MI)** asked Mr. Kantor to describe his reservations with the ADPPA's federal preemption provision, as well as to offer additional suggestions. Mr. Kantor argued that the exceptions to federal preemption would prevent its application in many instances, and he reiterated his concerns with private right of action.
- **Rep. Kelly Armstrong (R-ND)** remarked that his priority for a federal data privacy framework is to provide clarity and decrease litigation. He observed that the ADPPA provides exceptions to federal preemption, and he was concerned that this would result in additional litigation and lead to lack of action by state governments, particularly if excepted state laws are reconsidered for small amendments or technical changes. Mr. Miller agreed with Rep. Armstrong's concern.

### Business Compliance

- Ranking Member Bilirakis asked Ms. Ohlhausen to elaborate on how the ADPPA-established FTC Bureau of Technology would benefit from an office of "business mentorship" to assist companies with compliance. Ms. Ohlhausen observed the FTC's historical engagement in business education and argued that it is a useful tool.
- Ranking Member Rodgers noted Mr. Kantor's concern that small businesses could be held liable for their service providers tracking consumers' online traffic, and she asked Ms.

Ohlhausen for her thoughts. Ms. Ohlhausen emphasized that each player should be held accountable only for their own obligations and violations.

- Ranking Member Rodgers prompted Mr. Dufault to compare the ADPPA with the EU's GDPR in terms of competition. Mr. Dufault stated that the ADPPA improves on the GDPR's regulations for startups and small companies in two ways. First, he explained that the GDPR provides a "blanket ban" on processing unless there is a specific lawful basis, which he argued creates uncertainty for startups that are still determining their business models. Second, he noted that the ADPPA would provide resources to small companies through the establishment of a compliance program.
- **Rep. Robert Latta (R-OH)** emphasized the need to protect sensitive data and commended the ADPPA's differentiation of sensitive covered data. He asked Mr. Miller to explain why he believes the definition for sensitive covered data is too broad and should be narrowed. Mr. Miller responded that the bill's inclusion of online tracking activity under the definition of sensitive covered data would prevent ordinary company activities, such as collecting IP addresses and other identifiers.
- Rep. Guthrie asked about the impact of preserving digital advertising and opt-out on small businesses. Mr. Miller argued that the ADPPA's definition of targeted advertising combined with its definition of sensitive data is restrictive, perhaps even placing limitations on a company's advertising to its own digital customers. He advocated for the bill to allow companies to reasonably advertise to users on their own sites.
- **Rep. Neal Dunn (R-FL)** asked about the importance of a clear and consistent national data privacy law for small businesses. Mr. Kantor responded that a national framework where responsibilities are clearly articulated is especially important because, he argued, it would prevent larger companies from putting the legal obligation on small businesses. Mr. Kantor also called for payment data to be excluded from the ADPPA because it would result in many small businesses unfairly meeting the current definition of covered entity.
- **Rep. Jerry McNerney (D-CA)** asked how the bill could ensure that small businesses are able to implement effective data security practices. Mr. Kantor contended that the bill's data security requirements may not be appropriate to size, which he believed may complicate the FTC's work to ensure compliance among small businesses.
- Rep. Upton how small businesses could access necessary data if the bill is passed. Mr. Dufault answered that the FTC compliance programs provided by the ADPPA could help small businesses access necessary data in a way that is compliant with the law.

#### General Consumer Protections and Data Practices

- Chair Schakowsky advocated for consumer rights that are simple to understand and she underscored the importance of data minimization. When prompted by Chair Schakowsky, Mr. Lee explained that the ADPPA would make the internet safer for consumers by: (1) mandating data security requirements for companies; (2) including corporate accountability mechanisms; (3) creating protections for marginalized communities; and (4) requiring that businesses incorporate privacy by design principles.

- Chair Pallone asked about the importance of data minimization, to which Ms. Fitzgerald labeled it as “absolutely critical” because, she argued, it shifts the privacy protection onus from consumers to companies.
- Chair Pallone further asked Ms. Fitzgerald to distinguish data minimization from frameworks that rely on notice and choice. Ms. Fitzgerald contended that notice and choice requirements do not protect privacy, but instead create unreadable privacy policies for services that are essential to daily life.
- **Rep. Bobby Rush (D-IL)** remarked that he is a strong proponent of regulating data brokers — which are referred to as third-party collecting entities in the draft — and he applauded the ADPPA’s inclusion of these regulations. He asked Ms. Fitzgerald to explain the importance of regulating data brokers, as well as the impact of the ADPPA’s creation of a central registry of data brokers. Ms. Fitzgerald contended that data brokers are the “worst” offenders when it comes to data privacy because they lack a direct connection to consumers. She explicated her support for the ADPPA’s regulations, which she believed would curtail the data broker industry.
- Rep. McNerney asked whether it would be helpful to include data deletion standards, although he stopped short of specifying what this might entail. Ms. Fitzgerald responded that the bill already sets a standard for data deletion but added that FTC rulemaking would be useful to ensure that standards keep pace with technological changes.
- **Rep. Darren Soto (D-FL)** commended various aspects of the bill, including its data minimization and consumer rights provisions. Rep. Soto asked the witnesses if other consumer rights need to be added to the ADPPA. Ms. Ohlhausen answered in the negative, whereas Ms. Cuaresma asked for additional clarification on third-party advertising in the bill.
- **Rep. Larry Bucshon (R-IN)** highlighted the ADPPA’s inclusion of privacy by design guidelines to account for the size of the company and associated risks. Rep. Bucshon then asked if privacy by design requirements included in other global frameworks — such as the EU’s GDPR — have been effective. Mr. Miller answered in the affirmative, although he urged the development of clear privacy by design standards that businesses can utilize.
- **Rep. Robin Kelly (D-IL)** asked how the short-form privacy notices would help inform consumers. Mr. Lee asserted that long-form privacy notices are too difficult for most consumers to read, and he argued that short-form notices would ensure consumers understand how their data is being utilized.
- Rep. Kelly noted that the ADPPA’s opt-in requirement for sensitive data includes protections to prevent companies from using dark patterns, which are manipulative user interfaces that are designed to trick users into unknowingly taking certain actions.
- **Rep. Lizzie Fletcher (D-TX)** prompted Ms. Fitzgerald to describe why health data should be considered sensitive data in the ADPPA and why it is not sufficiently protected by HIPAA. Ms. Fitzgerald stated that HIPAA is reflective of the issues with sectoral federal laws because it only covers interactions with an individual’s doctor’s office, insurer, and exchange, but does not cover health data collected by platforms and applications. Rep. Fletcher agreed with Ms. Fitzgerald’s points.



- Rep. Fletcher asked about the importance of heightened restrictions for geolocation data. Ms. Fitzgerald argued that this data is not anonymized and can easily be traced back to individuals, calling for the ADPPA to regulate the geolocation data market.
- Rep. Dunn argued that data that is not generally considered to be sensitive can become sensitive when aggregated and individualized. He contended that companies should be required to provide notice to consumers if their data is being stored in adversarial countries such as China and Russia.
- **Rep. Greg Pence (R-IN)** advocated for consumers to be informed on how their data is collected, used, and shared “in plain language.” He argued that users should be compensated for the data that they bring to platforms, and he asked Ms. Fitzgerald about the feasibility of this. Ms. Fitzgerald noted the nuances in user compensation and cautioned against a system where the wealthy can afford privacy while low-income individuals voluntarily give up data to be compensated.

### Enforcement

- When Chair Schakowsky asked Mr. Brody to explain the bill’s enforcement mechanisms, he explained that the ADPPA would: (1) empower the FTC with a range of authorities and enforcement powers; (2) provide state attorneys general with the ability to fully enforce the law; and (3) allow for a private right of action.
- Ranking Member Rodgers noted that the ADPPA moves authorities from the FCC to the FTC with regards to online services, and she was apprehensive that the bill does not do the same for video and phone services. Ranking Member Rodgers asked Ms. Ohlhausen to describe the potential consequences of this “dual-regulatory regime.” Ms. Ohlhausen stressed the importance of maintaining the same protections and the same regulator for online, video, and phone services. She argued that the relevant protections in the Communications, Cable, and Satellite acts should be transferred to the FTC to preserve the protections and benefits that consumers already enjoy.
- Rep. Latta asked Ms. Ohlhausen to differentiate FTC rulemaking and guidance. Ms. Ohlhausen responded that — if Congress gave the FTC Administrative Procedure Act (APA) rulemaking authority in the ADPPA — the Commission would gather public comment, enact the rule, and then enforce it by imposing fines. The FTC, she continued, can also issue guidance, which is merely an interpretation of its authority and can only be enforced through litigation.
- **Rep. Lori Trahan (D-MA)** noted Ms. Cuaresma’s point that the full mandate of the FTC Youth Privacy and Marketing Division as provided by the ADPPA may not withstand judicial scrutiny. Ms. Cuaresma argued that the ADPPA needs to provide additional resources to the FTC to allow the division to engage in its statutorily-mandated activities.
- Rep. McNerney asked if the bill would allow the FTC to define effective encryption standards. Ms. Ohlhausen answered that the FTC has not traditionally been a technical agency and would therefore need to draw on outside expertise.
- **Rep. Kathleen Rice (D-NY)** noted the difficulties that state attorneys general face when bringing cases against tech companies for personal data violations. Mr. Brody explained that the lack of transparency usually acts as a “major barrier” to cases brought by state attorneys

general, and he argued that the ADPPA would provide state attorneys general with more information.

### *Discrimination and Algorithmic Bias*

- Chair Schakowsky asked Mr. Lee to describe the ADPPA's protections for children and marginalized communities. Mr. Lee stated that the bill would protect these communities by prohibiting discriminatory practices and mandating algorithmic impact assessments.
- Chair Pallone asked Mr. Brody how the bill's civil rights protections would prevent online discrimination. Mr. Brody remarked that the ADPPA includes "very strong" civil rights protections, including an anti-discrimination provision that prohibits companies from processing data in a manner that discriminates in the provision of goods and services. The bill, he continued, includes "robust" algorithmic bias assessment requirements, as well as a requirement that companies evaluate their algorithms for bias before deployment.
- Rep. Rush expressed frustration at the "ineffectiveness" of self-regulation and self-correction when it comes to discriminatory data practices and algorithms, and he asked Mr. Brody to explain "digital redlining." In response, Mr. Brody raised concerns that the historical consequences of redlining are being fed into algorithms to make financial and credit decisions, arguing that this perpetuates systemic inequality.
- Rep. McNerney pushed for the ADPPA's algorithmic impact assessments to include the harms of artificial intelligence (AI). Mr. Lee responded that the assessments would capture the harmful effects of AI.
- **Rep. Yvette Clarke (D-NY)** called for a federal data privacy framework, arguing that consumers are not adequately protected under the existing patchwork of regulations. Rep. Clarke applauded the ADPPA's inclusion of large pieces of her Algorithmic Accountability Act ([H.R.6580](#)) ([section-by-section](#)). Rep. Clarke asked why the algorithmic impact assessments are an important component of the ADPPA. Ms. Fitzgerald explained that regular assessments are necessary because algorithms change over time with the input of more data.
- Rep. Clarke noted that entities would also be required to evaluate algorithms during their initial design phase, and she asked why this evaluation is "crucial" to prevent algorithmic discrimination. Mr. Lee answered that the historical data that is plugged into algorithms is often reflective of past discrimination rather than present circumstances.

### *Children's Data Privacy and Protection*

- Ranking Member Bilirakis asked for Mr. Dufault's opinion on an actual knowledge standard compared to a constructive knowledge standard for covered entities when prohibiting certain practices aimed at children. Mr. Dufault responded that the actual knowledge standard is a "reasonable compromise," and he called for further consideration of what types of evidence would be permissible under the actual knowledge standard before expanding it.
- Ranking Member Bilirakis differentiated between the types and breadth of data collected on children by small businesses and large platforms, asking if regulations should only be reserved for the largest data holders. Mr. Kantor contended that segregating requirements by size is not necessary if the bill's obligations for different entities are properly articulated



and transparent. Mr. Kantor also agreed with Mr. Dufault's positive assessment of the actual knowledge standard.

- Chair Pallone asked how the ADPPA addresses the challenges that stem from teenagers utilizing social media. Ms. Cuaresma explained that the ADPPA's definition of sensitive covered data includes children under the age of 17, and she was supportive of not including the actual knowledge standard in this definition. She also highlighted the bill's ban on targeted advertising aimed at children. Ms. Cuaresma pushed back against the actual knowledge standard, arguing that companies already have the information that indicates whether a user is a minor because they use it in their targeted advertising.
- **Rep. Kathy Castor (D-FL)** stressed the importance of data privacy and protections for children. Rep. Castor asked Ms. Cuaresma to provide her thoughts on the bill applying children's protections to individuals aged 17 and below. Ms. Cuaresma stated that, as it relates to compliance, it would be more workable to cover anyone under the age of 18 because it better harmonizes with the legal definition of minors.
- Rep. Castor criticized the actual knowledge standard under the Children's Online Privacy Protection Act (COPPA) as being a "huge loophole for big tech companies to feign ignorance." She characterized this as an area for improvement in the ADPPA.
- Rep. Trahan supported the ADPPA as a "first step" to comprehensive data protection for consumers, emphasizing her support for the bill's children's data privacy provisions. Rep. Trahan asked Ms. Fitzgerald to explain why the Family Educational Rights and Privacy Act (FERPA) has been insufficient in protect students. Ms. Fitzgerald observed the "sectoral" nature of data privacy laws in the U.S., with FERPA only covering educational records and not the data collected by platforms that are commonly used by students.
- Rep. Trahan prompted Ms. Fitzgerald to describe how the provisions in the ADPPA could support the FTC's work to protect children's data. Ms. Fitzgerald responded that the algorithmic impact assessments would help the FTC with oversight, although she suggested that the bill should be more prescriptive with what is included in those reviews.
- Rep. Bucshon asked if the bill should include any additional guardrails to ensure that the FTC Youth Privacy and Marketing Division could accomplish its stated goals. Mr. Dufault noted the difficulties that the FTC faces when enforcing COPPA's actual knowledge standard, and he stressed the importance of working through these difficulties before expanding its application in the ADPPA.
- **Rep. Tim Walberg (R-MI)** referenced his Preventing Real Online Threats Endangering Children Today (PROTECT) Act ([H.R.1781](#)), which would modify and update COPPA. Rep. Walberg asked Ms. Ohlhausen to explain how the PROTECT Act would increase protections for children. Ms. Ohlhausen argued that COPPA is outdated and needs to be adapted to new technologies and business practices, which she believed the PROTECT Act would facilitate.
- Rep. Walberg asked about the importance of an actual knowledge standard compared to a constructive knowledge standard. Ms. Ohlhausen responded that the actual knowledge standard is meant to narrow enforcement and prevent a standard that is so sweeping as to potentially include adults. Mr. Dufault added that businesses would potentially have to collect more data to put together a picture of constructive knowledge.

- **Rep. Tony Cárdenas (D-CA)** asked why children and teenagers are uniquely vulnerable to privacy harms. Ms. Cuaresma explained that most individuals' brains do not fully develop until their mid-20s, leaving children and teenagers particularly susceptible to targeted advertising. The ADPPA, she explained, still allows for first-party advertising, and she drew attention to a potential loophole in the bill that could be exploited to allow for some third-party advertising.