

What To Watch As House Again Picks Up Data Privacy Mantle

By **Allison Grande**

Law360 (February 28, 2023, 10:45 PM EST) -- A newly rebranded U.S. House subcommittee will look to reinvigorate stalled efforts to enact federal consumer privacy legislation on Wednesday morning, when it's slated to hold a hearing that's likely to dig into established roadblocks like preemption and enforcement while raising new arguments to support forging ahead with these efforts.

After convening several hearings on the topic last year, the House Energy and Commerce Committee's Subcommittee on Innovation, Data and Commerce — which until this year had been called the Subcommittee on Consumer Protection and Commerce — will host its first hearing on the long-running push to enact a national framework to limit how companies collect, process and share consumers' personal data.

Congress made its most progress to date on the issue last year, when the House Commerce Committee advanced the American Data Privacy and Protection Act, or ADPPA. But the proposal failed to gain additional traction after then-Speaker Nancy Pelosi, a Democrat from California, objected to the federal bill overriding the more stringent privacy protections in her home state.

"I anticipate that the point of this hearing is to put the ADPPA back on the table and to start discussions and lay the groundwork again about the need for a federal privacy bill that's comprehensive and works for various stakeholders," said Cobun Zweifel-Keegan, managing director of the International Association of Privacy Professionals. "The House needs to get back to the same point they were at last year if they're going to have any chance at success of passing a federal privacy proposal this year."

Following November's midterm elections, leadership in the House has flipped, with Republican Cathy Rodgers of Washington serving as the chair of the Commerce Committee and Democrat Frank Pallone Jr. of New Jersey being the ranking member, and Reps. Gus Bilirakis, R-Fla., and Jan Schakowsky, D-Ill., helming the subcommittee.

But despite this change, the leaders have remained steady in their talking points and support of the ADPPA, which would give consumers the right to access, correct, delete and stop the sharing of their personal information; enhance data protections for children and teens; and clamp down on algorithmic bias.

"This seems to be an effort to reinvigorate last year's debate about a national privacy law," noted Kirk Nahra, co-chair of the cybersecurity and privacy practice at WilmerHale. "Obviously, the main momentum had been coming from this committee with surprising bipartisan support. This committee

wants to restart the effort."

The subcommittee has called three witnesses to testify at Wednesday's hearing: Alexandra Reeve Givens, the president and CEO of the Center for Democracy and Technology; Graham Mudd, founder and chief product officer of privacy tech company Anonym; and Jessica Rich, a former director of the Federal Trade Commission's Bureau of Consumer Protection who's currently of counsel and senior policy adviser for consumer protection at Kelley Drye & Warren LLP.

According to prepared remarks issued in advance of the hearing, which is titled "Promoting U.S. Innovation and Individual Liberty through a National Standard for Data Privacy," the witnesses are poised to advise the subcommittee on the urgent need for a federal privacy framework to counter a growing patchwork of state consumer privacy laws and close the growing divide between the U.S. and other regions, including the European Union and China, that have comprehensive national standards in place.

"The two main things I would be looking for is whether the bipartisan support for the bill from last year is still there, and whether there are individuals pushing for meaningful change to that bill," said Nahra, who predicted that there's likely "a limited window over about the next eight months" for federal lawmakers to get a privacy bill passed.

"Getting this bill through this committee is a necessary step, but all it will do is get them back to where they were last year," Nahra added. "If there is disagreement here, the effort likely fails this year."

Familiar Foes

Squabbles over whether a federal framework should preempt more stringent state laws and if consumers should be allowed to sue for alleged violations have long stood in the way of efforts to enact a comprehensive national privacy law, and these issues are expected to continue to provide fertile grounds for disagreement both at Wednesday's hearing and in the near future.

"These issues are big ones," said Liz Harding, a shareholder and vice chair of technology transactions and data privacy at Polsinelli PC. "If lawmakers can't get past them, then they can't have a federal bill."

The ADPPA attempted to address these points of contention by preempting the five comprehensive state privacy laws currently on the books, while still giving states room to put in place more targeted consumer protection laws related to areas such as student or employee privacy, cyberstalking, financial privacy and biometrics. The proposal would have also allowed consumers to bring lawsuits after notifying certain state and federal regulators beginning two years after the law takes effect.

On the issue of preemption, the California delegation, led by Pelosi, stood strong in their opposition to the federal proposal overriding California's landmark Consumer Privacy Act and the strengthened version of the law that was approved by state voters in 2020 and took effect in January 2023.

However, with Pelosi no longer in the speaker role, "the next steps for the House are different, now that one of the blockers isn't in charge anymore," noted Zweifel-Keegan of the International Association of Privacy Professionals.

While the California contingent "obviously remains a big political part of the House" and the speaker position has been assumed by another Californian, Republican Kevin McCarthy, the new leader has yet

to take a strong stance, and therefore may "not care so much about preempting California state regulation," Zweifel-Keegan noted.

Privacy experts will also be keeping an eye on how enforcement is discussed at Wednesday's hearing. With Rich, a former FTC official, on the roster of witnesses, discussions about how much power to give the FTC in enforcing any federal law are almost certain.

The FTC — which will soon be led by three Democratic commissioners following the looming departure of Christine Wilson, the agency's only Republican — has been ramping up its privacy enforcement activities under the leadership of Chair Lina Khan. The commission has mounted several notable enforcement actions, including a groundbreaking health data privacy action against GoodRx, and is in the midst of a yearslong effort to craft privacy and data security rules that could upend how companies use and disclose consumer data.

According to her prepared remarks, Rich will tell lawmakers that despite the progress the FTC has made on this front, "it needs more authority from Congress to be a truly effective privacy enforcer."

"Under current law, the FTC's authority is limited, whether pursuing case-by-case enforcement or attempting a Mag–Moss rulemaking," Rich wrote in her remarks, referring to the Magnuson–Moss Warranty Act, which sets out stringent standards for the FTC to establish new privacy rules. "Only Congress can establish the kind of broad-based protections contained in recent privacy bills such as the ADPPA."

This argument has and will probably continue to face the strongest headwinds in the Senate, where last year Commerce Committee Chair Maria Cantwell, D-Wash., blocked progress of federal privacy legislation on the grounds that the proposed enforcement mechanism was too weak. Cantwell is still leading the Senate Commerce Committee, meaning that any agreement reached on the question of how the law should be enforced will also need to appease her.

"As we saw last year, political will has proven to be the largest factor on federal legislation," said Christiana State, senior counsel at Crowell & Moring LLP.

The Senate Commerce Committee's new ranking member, Republican Ted Cruz of Texas, may also prove to be a roadblock.

His successor as ranking member, Sen. Roger Wicker, R-Miss., was one of the sponsors and a primary proponent of the ADPPA. While Cruz has yet to publicly offer his thoughts on privacy rulemaking, Zweifel-Keegan said the senator has generally shown to "not be a fan of big government and of expanding the regulatory state," which has the potential to create a significant challenge when it comes to proposals like the ADPPA, which seeks to expand the FTC's fining and rulemaking authority.

"There's a much bigger question about what the path to success is going to be in the Senate," Zweifel-Keegan noted.

Innovation and Competition Concerns Join the Mix

If the title of Wednesday's hearing is any indication, subcommittee members are also likely to delve into global innovation and competition issues that are increasing in urgency but haven't been regular staples in the federal privacy law debate yet.

In announcing the hearing, the subcommittee leaders called the enactment of a federal privacy law the "strongest way to promote innovation" and "ensure America's technological leadership and protect people's information, especially our children's, from misuse by Big Tech and access by the Chinese Communist Party."

"You're going to see, and we're already seeing to some extent, a shift in the narrative from Republican voices about why to support federal privacy legislation," Zweifel-Keegan said. "Given the name of the hearing, it's clear that conservative supporters of federal privacy legislation are starting to craft the narrative around competitiveness."

Without a nationwide privacy standard, the U.S. is currently "lagging behind" other major developed nations, including the U.K., EU, China, Brazil, Canada and Australia, which all have umbrella privacy regimes in place, according to Polsinelli's Harding.

"It doesn't look good on the international stage to not have a federal privacy law," Harding said.

Big Tech is also expected to be a major focus of Wednesday's hearing, given growing concerns from lawmakers on both sides of the aisle about the way major tech platforms use and share personal data for targeted advertising.

President Joe Biden also put a spotlight on this issue during his State of the Union earlier this month, during which he called on Congress to ban targeted advertising to children and put "stricter" guardrails on major tech companies' ability to collect, use and share personal data from all consumers.

This push could help move efforts to enact federal privacy legislation along faster than in previous years, noted State, the Crowell & Moring attorney.

"While you don't have to be Big Tech or even a tech company to be affected by privacy laws, there's been this interesting emphasis on the misuse of data by Big Tech, which was also raised in the announcement for this subcommittee hearing," she said.

The Network Advertising Initiative, an industry trade group, said a statement released Tuesday that while last year's ADPPA marked a "substantial step forward," it would have ultimately "favored dominant platforms, while stifling digital advertising, marketing, and other innovative uses that enable smaller innovators to compete with these 'walled gardens' that have direct relationships with billions of users."

The group urged the House subcommittee in taking up the effort again this year to be wary of creating "unintended side effects that actually increase the dominance of the largest internet platforms."

"While we applaud Congress for working toward lasting, impactful privacy rules in a bipartisan manner, the effort will be most effective if it changes several key provisions from last year's ADPPA that will unfairly harm smaller companies in the digital advertising ecosystem, and provide clear direction to companies that new state laws or new federal regulations alone cannot accomplish," said David LeDuc, NAI's vice president of public policy.

Competing Visions on Privacy

While the focus of Wednesday's hearing will be on comprehensive privacy legislation, it's unlikely that the subcommittee members and witnesses will be able to avoid addressing the wealth of narrower proposals on issues like financial privacy and kids' safety.

"What we're seeing is a real display of the differing visions of privacy in America right now, with competing committees within Congress trying to demonstrate their competing visions of how to regulate data privacy," said Aaron Charfoos, a partner in the privacy and cybersecurity practice at Paul Hastings LLP.

While the House Commerce Committee is squarely focused on a comprehensive framework, the Senate Commerce Committee, under Cantwell's leadership, instead passed a pair of more targeted measures to expand online privacy and safety protections for children.

And on Tuesday, the House Financial Services Committee easily advanced another narrower proposal, floated by Committee Chair Patrick McHenry, R-N.C., to amend the Gramm–Leach–Bliley Act by adding provisions that would regulate how financial institutions collect and process consumer data.

These more targeted proposals may prove easier to pass because comprehensive state privacy laws already exempt existing federal protections for financial, health and children's data from their statutes, so strengthening these protections wouldn't require a debate over preemption, Charfoos noted.

"There's this interesting tension in the U.S. that have prevented us from moving forward," Charfoos said. "On the one hand, there are a number of people saying we should have broad privacy laws to protect people, and on the other, we have others who say the focus should be on protections for sectors like finance, health and children."

The House subcommittee will attempt to begin the work of breaking through this stalemate at Wednesday's hearing.

"There's going to continue to be growing pressure on Congress to get something done, especially as states enact more laws that are going to require businesses to spend time and money to understand their nuances and how these laws apply to them," Polsinelli's Harding said.

--Editing by Alanna Weissman and Michael Watanabe.