

SEC Rulemaking Update American Privacy Rights Act of 2024 Proposed Rulemaking

On April 7, 2024, the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce jointly announced draft legislation in the form of a comprehensive data privacy act which is intended to preempt most state privacy laws. The American Privacy Rights Act of 2024 (**APRA**) would establish consumer data privacy rights and set standards for data security at the federal level. It would also require covered entities to disclose how they use consumer data and provide data privacy rights to consumers such as opting out of targeted advertising and data transfers, and give consumers the right to access, correct, delete, and export their data. It is generally modeled after its failed predecessor bill, the American Data Privacy and Protection Act (**ADPPA**), which failed to pass in the House. While it would preempt state laws broadly in this area, carveouts are present in the draft legislation for some of the existing remedies afforded to individuals by states such as California.

As a consumer privacy protection act, the APRA naturally delegates enforcement and regulatory authority to the FTC, mandating rulemaking and guidance. In addition to FTC enforcement, it would also give State attorneys general enforcement powers and individual consumers, a private right of action to sue the covered entity for violations of certain sections. The bill also sets standards for “data minimization” meaning it would require that companies in the U.S. use and collect data only for necessary and limited purposes, provide limitations about how it can be collected and stored or used, naming the specific permitted uses that are allowable, with narrower standards for sensitive information such as biometric and genetic information. The standards would also prohibit the transfer of sensitive data to third parties without affirmative consent from consumers. It would further provide protections to consumers against discrimination via the use of certain data and provide the consumer the right to opt out of the use of algorithms for “consequential decisions.” Notably, the legislation as currently drafted would also require each covered entity to designate a data privacy or security officer at the executive level. It would also put service providers of covered entities in a gatekeeping function, mandating that they must cease data practices with a covered entity if they have actual knowledge the entity is in violation of the act. Since its proposal, the House Energy and Commerce Committee has held one hearing on April 17, 2024, and an updated version of the bill has been advanced as of May 23, 2024.

The APRA applies to “covered entities” which would include ERAs and RIAs, with certain exemptions, discussed below. A covered is effectively any entity (including affiliates) that is subject to the Federal Trade Commission Act (15 U.S.C. 41 et. seq.) and that “alone or jointly with others, determines the purposes and means of collecting, processing, retaining, or transferring covered data,” among others. Small businesses, defined as having annual revenues of \$40,000 or less, would be excluded. Entities that are subject to and, importantly, “in compliance with” another federal privacy statute, such as financial institutions subject to the Graham-Leach

Bliley Act, may be effectively exempt, in that the bill would consider them to be in compliance with the APRA. However, this exemption would not extend to the covered entity, but merely the information protection standards and prohibitions of the Act. It would, therefore, still subject covered entities to additional enforcement by the FTC, and presumably, noncompliance with GBLA by a financial institution could trigger the applicability of the ARPA to an investment adviser.

See May 23 Draft Legislation

- https://d1dth6e84htgma.cloudfront.net/American_Privacy_Rights_Act_of_2024_Discussion_Draft_0ec8168a66.pdf

See U.S. Congressional Research Service Summary

- <https://crsreports.congress.gov/product/pdf/LSB/LSB11161>

See U.S. Committee Section-by-Section Summary

- <https://www.commerce.senate.gov/services/files/E7D2864C-64C3-49D3-BC1E-6AB41DE863F5>