June 13, 2022

The Honorable Frank Pallone
The Honorable Cathy McMorris Rodgers
House Energy & Commerce Committee

The Honorable Roger Wicker
Senate Commerce Committee

RE: draft 3-corners privacy bill, the American Data Privacy and Protection Act

Dear Chair Pallone, Ranking Member McMorris Rodgers and Ranking Member Wicker,

The Insights Association (IA), the leading nonprofit trade association for the market research and data analytics industry (also known as the insights industry), writes to provide urgent comment on your new draft comprehensive privacy legislation, the American Data Privacy and Protection Act, prior to hearing and markup in the House, and some recommended amendments (pages 2-7).

Our more than 7,200 members are the world's leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations and their employees, students and citizens. With that essential understanding, leaders can make intelligent decisions and deploy strategies and tactics to build trust, inspire innovation, realize the full potential of individuals and teams, and successfully create and promote products, services and ideas.

IA supports comprehensive federal privacy legislation and we welcome your efforts. A recent study[1] conducted by IA member companies Research Narrative and Innovate MR, on behalf of Privacy for America, revealed that nearly all Americans surveyed (92 percent) believe it is important for Congress to pass new legislation to protect consumers' personal data, and a majority (62 percent) prefer federal regulation over individual state regulations. Four out of five voters (81 percent) support a national standard that outright prohibits harmful ways of collecting, using, and sharing personal data. So do we.

However, details in such a bill, particularly the draft ADPPA, matter dearly to the insights industry.

Like most industries, we are quite concerned by the state preemption and private right of action, but there are other details upon which we wish to focus our recommendations, in priority order, below.

[1] New Study Shows Overwhelming Bipartisan Support for U.S. Federal Privacy Legislation. DECEMBER 1, 2021. https://www.insightsassociation.org/Information-Updates/Industry-News/View/ArticleId/16553/New-Study-Shows-Overwhelming-Bipartisan-Support-for-U-S-Federal-Privacy-Legislation

1. Sensitive covered data -- online activities and media viewership -- and independent audience measurement

Sensitive covered data would require an opt in for its collection, processing, or sharing with third parties, which makes sense. However, as drafted, the definition's clause (xi), covering online activities, and clause (xiv), covering media viewership, would not allow for independent audience measurement, an essential underpinning to valuation of content and advertising (online and offline), which responsibly collects and shares covered data about individuals for the purpose of understanding groups. IA urges you to protect independent audience measurement in Sec. 2 (22)(A) as follows, based on language used in Florida H.B. 9 earlier this year[2]:

Sec. 2 … (22) SENSITIVE COVERED DATA.— (A) IN GENERAL.—The term "sensitive covered data" means the following forms of covered data:

…. (xi) Information identifying an individual's online activities over time or across third party websites or online services, except when processed for the purpose of independently measuring or reporting advertising or content performance, reach, or frequency.

…. (xiv) Information identifying or revealing the extent or content of any individual's access or viewing or other use of any television service, cable service, or streaming media service, except when processed for the purpose of independently measuring or reporting advertising or content performance, reach, or frequency.

In concert with that definitional clarification, we recommend that the definition of targeted advertising be amended to also clarify such measurement in Sec. 2(26) as follows:

Sec. 2 … (26) TARGETED ADVERTISING.—The term "targeted advertising", notwithstanding Sec. 2(22)(xi) and Sec. 2(22)(xiv)—

(A) means displaying to an individual or unique identifier an online advertisement that is selected based on known or predicted preferences, characteristics, or interests derived from covered data collected over time or across third party websites or online services about the individual or unique identifier; and

(B) does not include—
(i) advertising or marketing to an individual in response to the individual's specific request for information or feedback;
(ii) first-party advertising based on an individual's visit into and purchase of a product or service from a brick-and-mortar store, or visit to or use of a website or online service that offers a product or service that is the subject of the advertisement;
(iii) contextual advertising when an advertisement is displayed online [that is related to/based on] the content of the webpage or online service on which the advertisement appears; or

[2] "Personal data processed solely for the purpose of independently measuring or reporting advertising or content performance, reach, or frequency pursuant to a contract with a controller that collected personal information in accordance with this act. Such information may not be sold or shared unless otherwise authorized under this act." https://www.flsenate.gov/Session/Bill/2022/9/

(iv) processing covered data solely for measuring or reporting advertising or content performance, reach, or frequency, including independent audience measurement.

2. Loyalty / pricing provisions and market research participation

Participant incentives are an important tool in the insights industry toolkit to encourage research subjects' involvement in market research involving their covered data, as response rates have declined. Participant incentives are particularly key to research in which the research subject has affirmatively consented to participate. Adding a new clause in Sec. 104(b) would help clarify the continued legality of participant incentives for research subjects in face of the draft bill's pricing discrimination provisions, as follows:

SEC. 104. LOYALTY TO INDIVIDUALS WITH RESPECT TO PRICING.

… (b) RULES OF CONSTRUCTION.—Nothing in subsection (a) shall be construed to prohibit—

(1) the relation of the price of a service or the level of service provided to an individual to the provision, by the individual, of financial information that is necessarily collected and used only for the purpose of initiating, rendering, billing for, or collecting payment for a service or product requested by the individual; ~~or~~

(2) a covered entity from offering a loyalty program that provides discounted or free products or services, or other consideration, in exchange for an individual's continued business with the covered entity, provided that such program otherwise complies with the requirements of this Act and any regulations promulgated under this Act~~.~~;

(3) a covered entity from offering a financial incentive or other consideration to an individual for participation in market research.

Along with it should come a definition of the term "market research" as follows in Sec. 2:

( ) MARKET RESEARCH.—The term "market research"—

means the collection, processing or transferring of covered data as reasonably necessary to investigate the market for or marketing of products, services, or ideas, where the information is not: (i) integrated into any product or service; (ii) otherwise used to contact any particular individual or device; or (iii) used to advertise or market to any particular individual or device."[3]

3. Third parties and legitimate access to data

The draft bill would unreasonably limit the data that the digital economy requires to enable commerce, understand consumers' and citizens' needs and desires, and maintain a functioning Internet for consumers. Access to data by and from third parties is vital to the U.S. economy and the functioning of government programs. Imposing burdensome and ambiguous requirements would thwart access to legitimate data by businesses, federal agencies, and local governments that rely on such data for day-to-day operations, and short-term and long-term planning and decision-making. IA urges you to amend Section 302(b) as follows:

[3] This definition for market research is based on one used by the model federal privacy legislation put forward by Privacy for America in Part I, Section 1, R: https://www.privacyforamerica.com/overview/principles-for-privacy-legislation/

Sec 302. (b) Third Parties.—A third party—

(1) shall not process third party data for a processing purpose inconsistent with the notice provided to individuals; ~~expectations of a reasonable individual;~~

(2) for purposes of paragraph (1), may reasonably rely on representations made by the covered entity that transferred the third party data regarding the notice provided to individuals ~~expectations of a reasonable individual, provided that the third party conducts reasonable due diligence on the representations of the covered entity and finds those representations to be credible~~; and

(3) shall be exempt from the requirements of section 204 with respect to third party data, but shall otherwise have the same responsibilities and obligations as a covered entity with respect to such data under all other provisions of this Act.

4. Market research needs a general exception

Critical product development and market research involving covered data should be permitted to function. The draft should not prevent companies and organizations from using data to better the products and services they offer to consumers or conduct research on the markets for their offerings. Innovation and developments in products and services work to benefit consumers. The bill should not unnecessarily restrict companies and organizations from using covered data to better their offerings (and public policies) for the general public (and for governments). Therefore, IA urges the amendment of Section 209(a) as follows:

SEC. 209. GENERAL EXCEPTIONS. …

(a) GENERAL EXCEPTIONS.—

A covered entity may collect, process, or transfer covered data for any of the following purposes, provided that the collection, processing, or transfer is reasonably necessary, proportionate, and limited to such purpose:

…. (2) With respect to covered data previously collected in accordance with this Act, notwithstanding this exception, to perform system maintenance, diagnostics, maintain a product or service for which such covered data was collected, conduct internal research or analytics to improve products, and services, and ideas or to develop new products, services or ideas, perform inventory management or network management, or debug or repair errors that impair the functionality of a service or product for which such covered data was collected by the covered entity~~, except such data shall not be transferred~~.

… (10) To process or transfer covered data as reasonably necessary to investigate the market for or marketing of products, services, or ideas, where the information is not—
(A) integrated into any product or service;
(B) otherwise used to contact any particular individual or device; or
(C) used to advertise or market to any particular individual or device.

5. Civil rights – discrimination and market research participation

Sec. 207(a) would prohibit covered entities from collecting, processing or transferring "covered data in a manner that discriminates or otherwise makes unavailable the equal enjoyment of goods or

services on the basis of race, color, religion, national origin, gender, sexual orientation, or disability." IA is concerned that choosing research subjects for participation in market research, when it involves a participant incentive, could be misconstrued as discrimination, despite the bill specifying that the prohibition doesn't apply to "diversifying an applicant, participant, or customer pool" (Sec. 207 (a)(2)(A)(ii)).

Research subjects are sought in certain segments and numbers for market research studies, with the samples varying depending on the needs and scope of the study. For example, a study may oversample or focus entirely on black homosexual women in their 30s and 40s – if a participant incentive is involved, would other potential research subjects disqualified from participation potentially have been discriminated against? The situation is different from Sec. 207 (a)(2)(A)(ii), since "diversity" is not explicitly the goal of every study; statistical or otherwise representation of a population (or populations) is more often the goal. Moreover, while participation in market research should not be considered a "good" or "service" to the research subject participating, if a participant incentive is involved, this could get misconstrued.

To preserve the ability to conduct market research and to adequately include necessary populations, IA requests an additional exception in Sec. 207(a)(2)(A):

Sec. 207 … (a) CIVIL RIGHTS PROTECTIONS.—

(1) IN GENERAL.—A covered entity may not collect, process, or transfer covered data in a manner that discriminates or otherwise makes unavailable the equal enjoyment of goods or services on the basis of race, color, religion, national origin, gender, sexual orientation, or disability.

(2) EXCEPTIONS.—This subsection shall not apply to—

(A) the collection, processing, or transfer of covered data for the purpose of—

(i) a covered entity's self-testing to prevent discrimination; or

(ii) diversifying an applicant, participant, or customer pool; or

(iii) <u>solely for purposes of determining participation of an individual in market research; or</u>

(B) any private club or group not open to the public, as described in section 201(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)).

Along with it should come a definition of "market research" as follows in Sec. 2:

<u>( ) MARKET RESEARCH.—The term "market research"—</u>
<u>means the collection, processing or transferring of covered data as reasonably necessary to investigate the market for or marketing of products, services, or ideas, where the information is not:(i) integrated into any product or service; (ii) otherwise used to contact any particular individual or device; or (iii) used to advertise or market to any particular individual or device.</u>[4]

Alternatively, IA recommends that you amend Sec. 207(a)(1) to make clear that it prohibits the processing of covered data in ways that discriminate against individuals for housing, education,

[4] As used in Part I, Section 1, R of the Privacy for America model federal privacy bill.

employment, healthcare, insurance, or credit opportunities (none of which would apply to participation in market research) as follows:

SEC. 207. CIVIL RIGHTS AND ALGORITHMS.
(a) CIVIL RIGHTS PROTECTIONS.—
(1) IN GENERAL.—A covered entity may not collect, process, or transfer covered data in a manner that discriminates or otherwise makes unavailable the equal enjoyment of goods or services for housing, education, employment, healthcare, insurance, or credit opportunities on the basis of race, color, religion, national origin, gender, sexual orientation, or disability.

6. Third parties and data sharing between affiliates

The draft bill would prevent covered data transfers between affiliates of large data holders. There is no consumer benefit or other principled reason for this restriction on intra-company data transfers. IA urges you to amend the definition of third party in Section 2(27) as follows:

Sec. 2 … (27) THIRD PARTY.—The term "third party"—

(A) means any person or entity that—
(i) collects, processes, or transfers third party data; and
(ii) is not a service provider with respect to such data; and

(B) does not include a person or entity that collects or transfers covered data from or to another entity if the 2 entities are related by common ownership or corporate control and share common branding~~, unless one of those is a large data holder or those entities are each related by common ownership or corporate control with respect to a large data holder~~.

7. Civil rights - impact assessments on algorithms

Requiring impact assessments for every processing activity or algorithm used by an insights company or organization would be exceedingly onerous and costly. Algorithm assessments and privacy impact assessments should be appropriately scoped to high risk data processing activities or processing activities involving sensitive covered data, not routine algorithm and processing functions, such as random sampling of research subjects for segments in a survey. IA recommends amending Sec. 207(c) and 301(d) as follows:

SEC. 207. CIVIL RIGHTS AND ALGORITHMS. … (c) ALGORITHM IMPACT AND EVALUATION.— (1) ALGORITHM IMPACT ASSESSMENT.—

(A) IMPACT ASSESSMENT.—Notwithstanding any other provision of law, not later than [4 years] after the date of enactment of this Act, and annually thereafter, a large data holder that uses an algorithm that may cause potential harm to a consumer, and uses such algorithm solely or in part, to collect, process or transfer sensitive covered data, must conduct an impact assessment of such algorithm.

… SEC. 301. EXECUTIVE RESPONSIBILITY.

… (d) LARGE DATA HOLDER PRIVACY IMPACT ASSESSMENTS.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act or 1 year after the date that a covered entity first meets the definition of large data holder, whichever is earlier, and

biennially thereafter, each large data holder shall conduct a privacy impact assessment that weighs the benefits of the large data holder's sensitive covered data collecting, processing, and transfer practices against the potential adverse consequences of such practices to individual privacy.

8. Data protections for children and minors – actual knowledge standard

The draft bill should retain the "actual knowledge" standard, with which companies are familiar due to the Children's Online Privacy Protection Act (COPPA), for restrictions on targeted advertising and data transfers regarding minors. (Even companies and organizations not specifically covered by COPPA look to the law/regulation as guidance on how to protect minors.) The "actual knowledge" standard sets a clear rule for companies and organizations to follow and should remain in the draft. The bill should also cap its requirements to individuals under age 16, which has become the common age range in state legislation and policy discussions. IA urges changes to Sec. 205 as follows:

SEC. 205. DATA PROTECTIONS FOR CHILDREN AND MINORS.

(a) PROHIBITION ON TARGETED ADVERTISING TO CHILDREN AND MINORS.—A covered entity shall not engage in targeted advertising to any individual under the age of ~~17~~ 16 if the covered entity has ~~[~~actual knowledge~~]~~ that the individual is under the age of ~~17~~ 16.

(b) DATA TRANSFER REQUIREMENTS RELATED TO MINORS.—A covered entity shall not transfer the covered data of an individual to a third party without affirmative express consent from the individual or the individual's parent or guardian if the covered entity ~~[~~has actual knowledge~~]~~ that the individual is ~~between~~ at least 13 years of age and under the age of ~~17~~ 16 years of age.

9. Sensitive covered data – health data

Sensitive covered data would require an opt in for its collection, processing, or sharing with third parties, which makes sense. While IA would ordinarily oppose the inclusion of race/ethnicity data in the definition of sensitive covered data, because it is such common demographic data in market research that it is even in the decennial census, clause (ix) adds a common-sense limitation: "in a manner inconsistent with the individual's reasonable expectation regarding disclosure of such information." A similar limitation is applied to clause (x), covering sexual orientation or behavior. Clause (ii) of the definition, however, includes various health data so broadly drawn as to potentially cover anything as simple as how a research subject feels today.

Therefore, IA requests similar language in an amendment to Sec. 2 (22) as follows:

Sec. 2 … (22) SENSITIVE COVERED DATA.—

(A) IN GENERAL.—

The term "sensitive covered data" means the following forms of covered data:

…. (ii) Any information that describes or reveals the past, present, or future physical health, mental health, disability, diagnosis, or healthcare treatment of an individual, in a manner inconsistent with the individual's reasonable expectation regarding disclosure of such information.

Next steps

The Insights Association and our members support consumer privacy protections, as we've discussed, and we look forward to talking with you, your staff, and your fellow legislators, and providing further information regarding these priorities and related issues with the American Data Privacy and Protection Act.

Sincerely,

Howard Fienberg
Senior VP, Advocacy
Insights Association

CC: House Energy & Commerce Committee members