

# Privacy



**Discover the App Economy**





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# Key Takeaways

- 1** ACT | The App Association gives small innovators a voice in the privacy debate in Congress and at federal agencies by illustrating how proposed laws and regulations would impact their ability to create jobs in your states and districts.
- 2** In the 117th Congress, legislators came closer than ever to passing a bipartisan privacy bill that would set a single, national set of rules for data privacy and security across all 50 states and the territories.
- 3** We urge the 118th Congress to pick up where those efforts left off, and in doing so, assess how any privacy legislation handles the “4 Ps of privacy”: Preemption, Private right of action, a Path to compliance, and Protection against unauthorized access.



# What Innovative Small Businesses Need in a Privacy Bill

Small software and connected device companies like App Association members handle millions of terabytes of data per day, putting them on the front lines of protecting and enabling responsible use of data. In recent years, growing customer expectations regarding privacy have created a competitive dynamic among App Association members to meet those expectations. The App Association gives small innovators a voice in the privacy debate in Congress and at federal agencies by illustrating how proposed laws and regulations would impact their ability to create jobs in your state and district.

In addition, we develop tools and guides to help our members comply with—and consumers understand—the Children’s Online Privacy Protection Act (COPPA), the Health Insurance Portability and Accountability Act (HIPAA), the EU’s General Data Protection Regulation (GDPR), the EU-U.S. Data Privacy Framework, and a growing patchwork of state privacy laws adopted around the country. We also host a privacy fellowship featuring some of the nation’s leading voices on privacy issues through our foundation arm, the Innovators Network Foundation.

In the 117th Congress, legislators came closer than ever to passing a bipartisan privacy bill, the American Data Privacy and Protection Act (ADPPA), which would set a single, national set of rules for data privacy and security across all 50 states and the territories, while better protecting consumers and limiting unnecessary compliance costs and legal gamesmanship.

We urge the 118th Congress to pick up where those efforts left off, and in doing so, assess how any privacy legislation handles the **“4 Ps of privacy”**: **Preemption, Private right of action, a Path to compliance, and Protection against unauthorized access.** If Congress strikes the right balance on these concepts, it can avoid the impending compliance tsunami from differing state laws and better enable our members to continue innovating, creating jobs, and revolutionizing industries from healthcare and education to agriculture and finance.

## Preemption

New privacy legislation in Congress should establish a single, national set of requirements by preempting state privacy laws of general applicability that would create the most significant confusion, conflict, and compliance issues we have urged Congress to avoid.

ADPPA’s overarching preemption language is reasonably strong, but future negotiators could improve it. In particular, we urge lawmakers to avoid adding so many exceptions to preemption provisions such that that courts may ultimately uphold state laws that differ substantially from federal requirements. Each exception to the preemption language adds further uncertainty as to Congress’ intent with respect to establishing a single set of rules rather than simply placing a federal layer on top of a divergent state patchwork.

## Protection Against Unauthorized Access

Although most general privacy bills deal primarily with requirements surrounding consumer notice and consent for certain processing activities—along with reasonable limits on authorized processing activities—we believe they should also require covered companies to take certain steps to detect, prevent, and remediate unauthorized access to personal information. These requirements should also preempt most state laws that would otherwise impose conflicting or substantially different data security obligations. Strong federal data security provisions would raise the average readiness of American companies to defend against cyberthreats of all kinds, from state-sponsored ransomware campaigns to social engineering and phishing attacks.

## Path to Compliance

Requirements in any privacy law should be calibrated to the underlying risk of the processing activities in question and should allow small companies to demonstrate privacy competence without being subject to immediate civil penalties for even small violations.

Importantly, ADPPA would provide a compliance program for small businesses adhering to Federal Trade Commission-approved compliance guidelines that “meet or exceed” ADPPA’s requirements. ADPPA would also deem companies that participate in approved compliance programs as complying with ADPPA itself.

Going forward, privacy legislation should provide a path to ensure that smaller and less risky companies are rightfully viewed as—and held accountable for—complying with a federal framework, while alleviating liability concerns and compliance burdens that the bigger companies can more easily shoulder.

## Private Right of Action

If a compromise federal privacy bill must include a private right of action (PRA), it must include guardrails to prevent opportunistic litigation strategies involving a pattern of suing and settling for frivolous reasons unrelated to protecting consumers.

The ADPPA’s approach to PRA, though broad, addresses some concerns we voiced with how private litigants could use it to inappropriately target smaller companies. The PRA in ADPPA as reported to the full chamber does not apply to covered companies with \$25 million or less in annual revenue, if they handle data on fewer than 50,000 individuals, and derive less than 50 percent of their revenue from transferring covered data. Similarly, if individuals accuse a company of violating ADPPA, that company could in most cases demonstrate that they have rectified the problem before the claim can go to court.