



## Data Privacy and Security Report: July 2023

A monthly roundup of federal data privacy and security policy and regulatory news

Welcome back to Holland & Knight's monthly data privacy and security news update that includes the latest in policy, regulatory updates and other significant developments. If you see anything in this report that you would like additional information on, please reach out to authors or members of Holland & Knight's [Data Strategy, Security & Privacy Team](#).

### LEGISLATIVE UPDATES

#### Fall 2023 Outlook

**Current Status:** Congress departed Washington, D.C., on July 28, 2023, for August recess. Before adjourning, the Senate Committee on Appropriations favorably reported all 12 appropriations bills, but the full Senate has yet to pass any of the bills. The House Committee on Appropriations favorably reported only 10 appropriations bills, and the full House has approved only the Military Construction-Veterans Affairs spending bill by a 219-211 vote. House Republicans planned a vote on the Agriculture spending bill before recess but pulled the vote at the last minute over internal disagreements between Republicans. The U.S. Senate is set to return on Sept. 5, 2023, and the U.S. House of Representatives will return on Sept. 12, 2023. When Congress returns, it will have to pass a continuing resolution (CR) to avoid a shutdown before the current fiscal year ends on Sept. 30, 2023, or face a government shutdown.

**Risks:** Adding to the complexity of the appropriations process, on June 3, 2023, President Joe Biden signed into law the [Fiscal Responsibility Act of 2023](#) (H.R. 3746), which suspended the nation's debt limit through Jan. 1, 2025, and set spending caps for Fiscal Years (FY) 2024 and 2025. The deal keeps non-defense spending roughly flat with current (FY 2023) levels in FY 2024 (\$704 billion). The deal also caps defense spending at \$886.3 billion for FY 2024, a 3.3 percent increase over FY 2023. The bill also created a penalty to incentivize the enactment of the FY 2024 and FY 2025 appropriations bills – if all 12 appropriations bills are not enacted by Jan. 1, 2024, non-defense and defense spending limits are reduced to 1 percent below FY 2023. This penalty was intended to create an incentive strong enough to support the enactment of a final FY 2024; however, conservative Republicans believe these cuts do not go far enough, and the two parties have not agreed on a pathway forward.

**Barriers to Passing a CR:** The president has also [requested](#) \$40 billion in supplemental funding for Ukraine, border funding, disaster relief and fentanyl-abatement efforts, which runs counter to House Republicans' goal of cutting spending. Senate Appropriations Committee Chair Patty Murray (D-Wash.) and Vice Chair Susan Collins (R-Maine) [agreed](#) on a bipartisan basis to add \$13.7 billion in additional emergency appropriations, including \$8 billion for defense and \$5.7 billion for non-defense spread across four subcommittees.

On July 10, 2023, 21 House Republicans – members of the conservative Freedom Caucus – signed a letter to House Speaker Kevin McCarthy (R-Calif.) making a number of demands before they would support the FY 2024 appropriations bills. The primary demand is to reduce federal spending to FY 2022 levels instead of FY 2023 levels. Based on the current make-up of the House, Republicans can only lose four votes and still pass the appropriations bills with Republican votes only, so if the 21 signatories insist on the demands in the letter, they have enough votes to force their consideration or require



Speaker McCarthy to rely on Democratic votes to pass the CR. One of the Freedom Caucus members, Rep. Bob Good (R-Va.), stated that if the government shut down, "most Americans won't even miss" it. If Freedom Caucus members are not concerned about shutting down the government to get what they want, it will create a challenging environment for Speaker McCarthy.

**Expectations:** Republicans and Democrats will spend the month of August negotiating and counting votes to advance a CR before Sept. 30 to buy more time to enact the final FY 2024 appropriations bills. Speaker McCarthy vowed to his caucus on Aug. 14, 2023, that any CR would last no later than early December to avoid running into the winter holidays. In turn, Senate Majority Leader Chuck Schumer (D-N.Y.) said a CR through early December "makes a good deal of sense." Conservative Republicans in the House will likely seek to extract a reduction in government spending in exchange for a CR that keeps the federal government open. Democrats are unlikely to support anything short of a clean CR and a final FY 2024 appropriations bill consistent with the spending caps agreed to in the debt deal. Reaching a deal to pass a CR will be challenging and may result in a government shutdown to create the urgency to reach a deal.

## Senate Commerce Marks Up Children's Privacy Bills

On July 27, 2023, the Senate Committee on Commerce, Science, and Transportation held a [markup](#) on bipartisan measures that aim to enhance kids' online safety and privacy. The committee favorably reported the two bills, [the Children and Teens' Online Privacy Protection Act \(S. 1418\)](#) (COPPA 2.0) and [the Kids Online Safety Act \(S. 1409\)](#) (KOSA). Senate Majority Leader Chuck Schumer (D-N.Y.) intends to bring kids' privacy bills to the Senate floor for a vote in the coming months. United for Privacy, a coalition of advocacy groups, sent a [letter](#) to members of Congress urging the passage of a comprehensive federal data privacy bill that creates a uniform national standard, preempts state law and ends the patchwork of state privacy laws. Nevertheless, passage in the House will likely be more difficult. House Committee on Energy and Commerce Chair Cathy McMorris Rodgers (R-Wash.) has indicated that she prefers a comprehensive national standard on data privacy over narrow child protections.

The kids' privacy bills passed by Senate Commerce Committee include:

- **COPPA 2.0:** Sens. Ed Markey (D-Mass.) and Bill Cassidy (R-La.) would reform the [existing Children's Online Privacy Protection Act \(COPPA\) law](#) to prohibit online companies from collecting personal information from users who are under 17 years old without their consent and ban targeted advertising to children and teens. This is similar to previous renditions of the bill.
- **KOSA:** Sens. Richard Blumenthal (D-Conn.) and Marsha Blackburn (R-Tenn.) reintroduced this bill that would impose a duty of care for digital services to prevent harm to younger users.

For other kids' privacy bills introduced or reintroduced in the Senate, view the [May 2023 Holland & Knight Data Privacy and Security Report](#).

## House Judiciary Committee Holds Hearing on FTC Oversight

The House Committee on the Judiciary held a hearing on July 13, 2023, "[Oversight of the Federal Trade Commission](#)," in which the committee examined management of the FTC, its record of enforcement actions and rulemakings under Chair Lina Khan. In her [testimony](#), Khan highlighted the FTC's activities and initiatives, as well as challenges facing the agency as it works to fulfill its dual mission of promoting competition and protecting American consumers from unfair or deceptive practices in the marketplace.



On the competition side, Khan argued the FTC continues to target illegal mergers and conduct, and challenge transactions in critical sectors of the economy, including semiconductors, defense, energy, healthcare, mortgage technology, digital markets and pharmaceuticals. Khan highlighted a bipartisan coalition of 10 state attorneys general to charge pesticide manufacturers and the FTC's rule that would ban employers from imposing noncompete restrictions. (For further insight, see Holland & Knight's previous alert, "[FTC Proposes an End to Employee Non-Compete Agreements](#)," Jan. 6, 2023.) On the consumer protection side, Khan focused on combatting fraud and protecting consumer privacy. She highlighted the FTC's enforcement actions under the Opioid Addiction Recovery Fraud Prevention Act, Health Breach Notification Rule, Military Lending Act (MLA) and Made in USA Labeling Rule.

Khan also mentioned multiple actions using authority under existing rules such as COPPA. For example, in December 2022, the FTC [announced](#) a law enforcement action against Epic Games Inc. over charges the company violated COPPA and imposed unfair default privacy settings on children and teens. She also highlighted the FTC's [launch](#) of a new Office of Technology to strengthen the agency's ability to keep pace with technological challenges in the digital marketplace.

House Judiciary Committee Chair Jim Jordan (R-Ohio) criticized Khan and accused her of "mismanagement of the FTC and its disregard for ethics...and politicized rulemakings." In his opening statement, Jordan criticized Khan for putting burden and costly demands on parties and for failing to comply with congressional oversight or requests from the committee.

## **Members of Congress Reveal Alleged Breach of Privacy by Tax Prep Companies**

Sens. Elizabeth Warren (D-Mass.), Richard Blumenthal (D-Conn.), Tammy Duckworth (D-Ill.), Bernie Sanders (I-Vt.) and Sheldon Whitehouse (D-R.I.), along with Senate Finance Committee Chair Ron Wyden (D-Ore.) and Rep. Katie Porter (D-Calif.), released a new report, "[Attacks on Tax Privacy: How the Tax Prep Industry Enabled Meta to Harvest Millions of Taxpayers' Sensitive Data](#)." The report, which comes after a seven-month-long investigation, alleges potentially illegal sharing of taxpayers' sensitive personal and financial information with Meta by online tax preparation companies.

The lawmakers also sent a [letter](#) to the IRS, Treasury Inspector General for Tax Administration, FTC, and U.S. Department of Justice (DOJ) highlighting their key findings and calling on these departments to fully investigate the matter and prosecute any company or individuals who violated the law. The companies shared millions of taxpayers' tax return data, meaning they could face billions of dollars in potential criminal liability.

## **Bill's Reintroduction Seeks to Stop the Government from Purchasing Americans' Data**

Reps. Warren Davidson (R-Ohio), Zoe Lofgren (D-Calif.), Jerry Nadler (D-N.Y.), Andy Biggs (R-Ariz.), Ken Buck (R-Colo.), Pramila Jayapal (D-Wash.), Thomas Massie (R-Ky.) and Sara Jacobs (D-Calif.) reintroduced the bipartisan [Fourth Amendment Is Not For Sale Act](#) on July 14, 2023. This legislation [seeks](#) to stop the federal government from circumventing the Fourth Amendment right to privacy "by closing loopholes that allow the government to purchase Americans' data from big tech companies without a search warrant." The House Judiciary Committee held a markup on the bill where committee members reported the bill favorably by a vote of 30-0. Similar legislation, the [Purchased Data Inventory Act](#), was introduced in the Senate by Committee on Homeland Security and Governmental Affairs Chair Gary Peters (D-Mich.).



## Senators Continuing Work on Judiciary's Subcommittee on Privacy, Technology, and the Law

As reported in the [June 2023 Holland & Knight Data Privacy and Security Report](#), the Senate Committee on the Judiciary Subcommittee on Privacy, Technology, and the Law is continuing its work on the oversight of AI. The subcommittee's leadership – Sens. Richard Blumenthal (D-Conn.) and Josh Hawley (R-Mo.), the chair and ranking member, respectively – held a hearing on July 25, 2023, "[Oversight of A.I.: Principles for Regulation](#)." Witnesses from industry, think tanks and academia spoke on the importance of passing a national standard and protecting consumers.

### Senate Bill Seeks to Create Tech Commission

Sens. Elizabeth Warren (D-Mass.) and Lindsey Graham (R-S.C.) [unveiled legislation](#) that seeks to establish a new independent, five-member regulatory agency – the Digital Consumer Protection Commission – to regulate online platforms. The commission would have concurrent jurisdiction between the FTC and DOJ, and it would be responsible for overseeing and enforcing the new statutory provisions in the bill, as well as implementing rules to promote competition, protect privacy, protect consumers and strengthen national security. Graham has previously included in another bill ([the EARN IT Act](#)) the creation of a new commission on Online Child Sexual Exploitation Prevention, which would be tasked with creating voluntary best practices. That bill [passed](#) out of the Judiciary Committee in May, but the bill has thus far failed to gain enough traction to pass in the full Senate.

To address concerns over foreign ownership and influence of platforms like TikTok, the bill also requires a U.S. citizen to own dominant platforms or the dominant platform must have a U.S. subsidiary. [Reportedly](#), Sen. Maria Cantwell (D-Wash.) is drafting her own bill addressing issues posed by the TikTok platform to address broader national security concerns rather than banning TikTok specifically.

It is unlikely that the Warren-Graham bill will gain much traction, since Congress is typically hesitant to create new agencies and neither of the bill's sponsors sit on the Senate Commerce Committee, which shares jurisdiction over the bill.

## EXECUTIVE AND DEPARTMENTAL UPDATES

### White House Announces Nominations of 2 FTC Commissioners

On July 3, 2023, President Joe Biden [announced](#) two nominations to fill the vacant seats slotted for Republicans on the FTC. The first nominee, Andrew Ferguson, is the Solicitor General of the Commonwealth of Virginia, where he oversees the appellate litigation of Virginia and its agencies and represents Virginia before the U.S. Supreme Court, Virginia Supreme Court and other federal courts of appeals. Before his appointment as Solicitor General, Mr. Ferguson served as chief counsel to Senate Minority Leader Mitch McConnell (R-Ky.) from 2019 until 2021, and prior to that, served as the Chief Counsel for Nominations and the Constitution to then-Senate Judiciary Committee Chair Lindsey Graham (R-S.C.), as well as Special Counsel to then-Judiciary Committee Chair Chuck Grassley (R-Iowa). The second nominee, Melissa Holyoak, currently serves as the Utah Solicitor General, where she manages the civil and criminal appeals, constitutional defense and special litigation, and anti-trust and data privacy divisions. Prior to joining the Utah Attorney General's Office, Holyoak served as president and general counsel of Hamilton Lincoln Law Institute, a public interest firm based in Washington, D.C., that represents consumers challenging unfair class actions and regulatory overreach.





Both nominees will be before the Senate committees of jurisdiction prior to the full Senate votes on their confirmation. If confirmed, they will replace former Republican FTC Commissioners Noah Phillips, who stepped down last fall to return to private practice, and Christine Wilson, who resigned earlier this year over her perceived abuses of power by FTC Chair Lina Khan.

## **White House Secures Voluntary Safety Commitments from AI Companies**

On July 21, 2023, President Biden announced that leading AI companies have agreed to voluntary commitments "to help move toward safe, secure, and transparent development of AI technology." The White House released a [fact sheet](#) on how these companies will manage the risks posed by AI. These commitments, which the companies have chosen to undertake immediately, underscore three principles – safety, security and trust – that must be fundamental to the future of AI and mark a critical step toward developing responsible AI. According to the fact sheet, "as the pace of innovation continues to accelerate, the Biden-Harris Administration will continue to remind these companies of their responsibilities and take decisive action to keep Americans safe." However, it is unclear how the administration plans to conduct oversight on these companies. The enforceability question supports Senate Majority Leader Chuck Schumer's (D-N.Y.) efforts on AI legislation.

## **FTC Seeks Comment on Parental Consent Mechanism Under COPPA**

The FTC is [seeking comment](#) on an application from the Entertainment Software Rating Board (ESRB) and others for a new mechanism for obtaining parental consent under COPPA. ESRB, which currently operates a COPPA safe harbor program, joined in its application by Yoti, a digital identity company, and SuperAwesome, which provides technology to help companies comply with parental verification requirements, requested approval for the use of "Privacy-Protective Facial Age Estimation" technology. This technology analyzes the geometry of a user's face to confirm that an individual is an adult. Under the COPPA Rule, online sites and services directed to children under 13 years old must obtain parental consent before collecting or using personal information from a child. The rule lays out a number of acceptable methods for gaining parental consent but also includes a provision allowing interested parties to submit new verifiable parental consent methods to the commission for approval. According to the [Federal Register notice](#), the comment period closes on Aug. 21, 2023.

## **SEC Finalizes Cybersecurity Rules**

On July 26, 2023, a divided U.S. Securities and Exchange Commission (SEC) adopted new cybersecurity rules for public companies. The rules include cybersecurity incident notification requirements and governance disclosure obligations. For further insight, see Holland & Knight's alert, "[SEC Finalizes Cybersecurity Incident and Governance Disclosure Obligations for Public Companies](#)," July 31, 2023.

## **SEC Chair Remarks on AI**

At a speech on July 17, 2023, at the National Press Club in Washington, D.C., SEC Chair Gary Gensler [warned](#) that AI may be a new tool for fraudsters to take advantage of Americans' personal data. Despite AI's ability to "create great efficiencies across the economy," he warned that fraudsters "may try to [deceive the public] in a narrowcasting way, zeroing in on our personal vulnerabilities." He said, "Make no mistake, though, under the securities laws, fraud is fraud. The SEC is focused on identifying and prosecuting any form of fraud that might threaten investors, capital formation, or the markets more broadly." Despite these warnings that AI presents both micro- and macro-challenges, Gensler still said



that there are positives to AI and that the SEC and public, more broadly, will have to make changes to society.

## **Amazon Agrees to Penalty Over Violations Related to Children's Privacy Law**

On July 19, 2023, the DOJ and FTC [announced](#) that Amazon agreed to a permanent injunction and a \$25 million civil penalty as part of a settlement to resolve alleged violations of COPPA, the COPPA Rule and the Federal Trade Commission Act (FTC Act) relating to Amazon's voice assistant service Alexa. Since May 2018, Amazon's Alexa-related offerings have included voice-activated products and services directed toward children under 13 years of age. When a user makes a verbal request of an Alexa-enabled device, Amazon saves the voice recording of the request and creates a written transcript of it. The relevant [complaint](#) alleged that Amazon retained children's voice recordings indefinitely by default, in violation of COPPA's requirement that these recordings be retained only if necessary to fulfill the purposes for which they were collected. The complaint also alleges Amazon made deceptive representations that Alexa app users could delete their children's voice recordings, including audio files and transcripts and their geolocation information, when Amazon sometimes failed to delete all such information at users' request. This penalty demonstrates the FTC's increasing focus on children's privacy enforcement.

## **STATE UPDATES**

### **Oregon and Delaware Become 12th and 13th States to Enact Privacy Legislation**

On July 18, 2023, the Oregon Consumer Privacy Act (OCPA) became law, marking the 12th state to enact a consumer data privacy law. Like similar laws, the OCPA applies to those who do business in Oregon or who provide products or services to Oregon residents. The OCPA will go into effect on July 1, 2024, which is the same date as other recently enacted privacy laws in Texas and Florida, which was covered in the [June 2023 Holland & Knight Data Privacy and Security Report](#). Delaware Gov. John Carney also signed into law the state's personal data, privacy and consumer protection bill. This 13<sup>th</sup> state privacy bill will apply to entities that conduct business in the state of Delaware that control personal data of 35,000 consumers or more.

Oregon and Delaware join California, Virginia, Colorado, Connecticut, Utah, Iowa, Indiana, Tennessee, Montana, Florida and Texas in enacting a comprehensive consumer data privacy law.

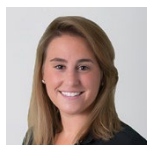
As the number of state privacy laws grows, reaching consensus on a federal privacy bill that attempts to create one national standard could become more fraught politically for lawmakers whose state privacy laws could be preempted by a federal standard. Nevertheless, key congressional committees continue to negotiate provisions of a federal privacy bill and intend to reintroduce a modified version of the American Data Privacy and Protection Act (ADPPA) this year.

### **California Privacy Protection Agency Inquiring About Vehicles and Data Privacy Practices**

The California Privacy Protection Agency (CPPA) – the first independent data protection authority in the United States to implement and enforce the state's comprehensive data privacy and security law – announced a review of data privacy practices by connected vehicle (CV) manufacturers and related CV technologies. These vehicles include location sharing, web-based entertainment, smartphone integration and cameras. Data privacy considerations are critical, according to the agency, "because these vehicles often automatically gather consumers' locations, personal preferences, and details about

their daily lives." The agency is conducting this review under the California Consumer Privacy Act (CCPA). First adopted in 2018, the CCPA provides Californians with key privacy rights, including the right to know the personal information collected about them by businesses, the right to delete that information, and the right to stop its sale or sharing.

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