



February 18, 2020

## SENATORS INTRODUCE PROPOSALS TO OVERHAUL DATA AND PRIVACY ENFORCEMENT

While the California Consumer Privacy Act continues its development (see our prior ALERTS dated February 10, 2020 and February 11, 2020), two U.S. Senators introduced proposals that would significantly alter federal data privacy regulation.

### Data Protection Act

On February 13, 2020, Democrat Senator Kirsten Gillibrand released the Data Protection Act, a proposal to overhaul how the U.S. Government regulates privacy. If enacted, the Data Protection Act would create the Data Protection Agency (“DPA”), an independent federal agency that would protect Americans’ data, safeguard their privacy and ensure data practices are fair and transparent.

The Data Protection Act gives the DPA the authority and resources to enforce data protection rules with a broad range of enforcement tools, including civil penalties, injunctive relief and equitable remedies. According to Senator Gillibrand’s press release for the Data Protection Act, the DPA has three core missions: (i) give Americans control and protection over their own data by creating and enforcing data protection rules, (ii) maintain the most innovative, successful tech sector in the world by ensuring fair competition within the digital marketplace and (iii) prepare the American government for the digital age.

The proposed Data Protection Act sets forth provisions on how the DPA should be established, objectives and functions of the DPA, rulemaking authorities and enforcement powers; however the Data Protection Act does not include any new data privacy laws.

### FTC Reform

Currently, the Federal Trade Commission (“FTC”) is the federal agency tasked with investigating and bringing action against consumer data abuse. On February 10, 2020, Republican Senator Josh Hawley introduced a proposal to overhaul the FTC. Senator Hawley criticized the FTC for standing by as actors in the digital market violated the laws to obtain monopoly power, including naming Google and Facebook as such actors.

The proposal states that the FTC has (i) an accountability

problem, (ii) financial conflicts of interest among FTC officials and (iii) an outdated toolkit that does not allow the FTC to address the unique challenges of dynamic digital markets. To rectify these problems, Senator Hawley proposes that Congress should pursue a multifaceted structural reform of the FTC, including:

- Relocating the FTC to the Department of Justice (“DOJ”) and providing for clear and direct oversight;
- Eliminating the multi-member commission and replacing it with a single Director that reports directly to the Associate Attorney General;
- Ending the jurisdictional overlap regarding mergers and acquisitions by reassigning that responsibility to the Antitrust Division;
- Creating a new Digital Market Research Section within the FTC composed of technologists, economists and mark specialists tasked with conducting comprehensive studies about digital markets, supporting the enforcement litigation of the DOJ and reporting regularly to Congress;
- Providing updated enforcement authority to the FTC to deconstruct barriers to entry in the digital markets and authority to impose penalties for first-time offenses;
- Imposing stricter ethics requirements on senior personnel in the reformed FTC and enforcing an appropriate cooling-off period after leaving the FTC; and
- Eliminating constitutionally problematic aspects of the FTC by guaranteeing a party’s right to litigate facts in federal court.

Senator Hawley’s proposal is set forth on his website and is not in the form of draft legislation.

### Other Measures

In November 2019, top Democratic Senators released the Privacy and Data Protection Framework that sets forth a set of core principles that the Senators believe should be included in any comprehensive data protection legislation. See our prior ALERT dated November 21, 2019. At the end of 2019, a group of top Democrats in the U.S. Senate introduced the Consumer Online Privacy Rights Act (“COPRA”), a digital privacy act modeled after the European General Data Protection Regulation and the California Consumer Privacy Act. See our prior ALERT dated January 15, 2020.

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The COPRA requires that the Federal Trade Commission establish a new bureau to regulate compliance with the COPRA.

In January 2020, we reported that Florida, Illinois, New Hampshire, Virginia and Washington have all introduced data privacy legislation. See our prior ALERT dated January 15, 2020. Arizona, Maryland, Nebraska and New Jersey have joined these states by introducing forms of data privacy legislation.

As lawmakers continue to introduce proposals and legislation to regulate consumer data privacy, this year could be the year that a federal data privacy law and new data and privacy agency is established. We will continue to monitor federal and state privacy legislation and provide updates. Current information on state and federal privacy laws can be found in our Marketing and Privacy Digest [www.dtlaw.com/Multistate-Digests/](http://www.dtlaw.com/Multistate-Digests/). Let us know if you have any questions. □

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