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State of Play: Data Privacy

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| <p>OUR VIEW</p> | <p><i>State of Play:</i> Comprehensive privacy legislation has seen many of the same fits and starts in Congress for more than a decade. Every iteration has been bogged down by similar policy roadblocks and committee jurisdiction fights – this effort is no different. This Congress, the effort has been fueled by populist anger against Big Tech, the EU’s General Data Protection Regulation (GDPR), numerous state privacy laws like the California Consumer Privacy Act (CCPA), and responses to major data breaches like at Equifax. The recent Capital One breach will most certainly provide additional fuel to the fire. The privacy debate raises new questions, and policymakers have stumbled on issues around private rights of action, scope of preemption, and who would be subjected to the new framework. Each of these issues touch on central tenants of Republican and Democratic philosophy.</p> <p><i>Our View:</i> Congress will be unable to broker a comprehensive policy solution this Congress, especially given the shrinking legislative calendar. Bandwidth will be further consumed with additional oversight hearings in the wake of the Capital One breach. However, there remains positive signs that narrowly targeted privacy legislation could be signed into law. Specifically, the work of Senate Banking Committee Chairman Mike Crapo (R-ID) and Ranking Member Sherrod Brown (D-OH) could result in data privacy legislation amending the Gramm-Leach-Bliley Act (GLBA), Fair Credit Reporting Act (FCRA), and/or Equal Credit Opportunity Act (ECOA) to address concerns with data aggregation and sharing between non-bank, non-financial companies and those who use data to offer financial products and services.</p> |
| <p>WHAT TO WATCH</p> | <p>Congress appears to be in a holding pattern on comprehensive data privacy legislation. Here are the important markers to look for in the near term:</p> <ul style="list-style-type: none"> • The legislative calendar is shrinking going into a presidential election year – can the Senate or House produce bipartisan legislation by the end of this calendar year? • Comprehensive federal privacy legislation would most likely be introduced in the Senate Commerce Committee – can Chairman Roger Wicker (R-MS) and Ranking Member Maria Cantwell (D-WA) reach a bipartisan agreement on a bill and release legislation in September? • The Senate Banking Committee continues a bipartisan focus on narrow privacy issues – will Chairman Crapo and Ranking Member Brown release a draft privacy framework amending the FCRA, ECOA, or GLBA? • Facebook was fined a record \$5 billion by the FTC – will the terms of the enforcement action provide a roadmap for privacy safeguards going forward? • Facebook was called to testify about its Libra project in front of the Senate Banking and House Financial Services Committees and did little to calm their fears – will the distrust and skepticism of Big Tech from Congress fuel the privacy debate or further complicate the policy? |

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| | <ul style="list-style-type: none"> • Capital One suffered one of the largest financial services sector data breaches in history. Much of the focus on data privacy has centered around the use and monetization of consumer data – will the Capital One breach revive data security as a central point in the broader privacy debate? • CCPA was passed in June 2018 and is effective in January. Bills in at least 19 other states have passed or introduced similar legislation – will states continue to fill the void in the absence of federal action? |
| <p>CONGRESS</p> | <p>There is strong interest in Congress for comprehensive federal privacy legislation, but the complexities of overlapping jurisdiction by several congressional committees present a major obstacle.</p> <p>Senate Commerce Committee</p> <ul style="list-style-type: none"> • Comprehensive federal privacy legislation is most likely to come out of this committee. A separate House bill would originate in the Energy and Commerce Committee. • Senate Commerce has held three hearings on policy principles for a federal data privacy framework, featuring testimony from industry, small business, and consumer groups. • A 6-person working group of Chairman Roger Wicker (R-MS), Ranking Member Maria Cantwell (D-WA), Jerry Moran (R-KS), Richard Blumenthal (D-CT), Brian Schatz (D-HI), and John Thune (R-SD) has been working to introduce legislation before August recess, with the goal of passing a bill before the California Consumer Privacy Act (CCPA) takes effect in January. However, progress has been stalled since late June when Senator Cantwell stepped away from the working group to negotiate bilaterally with Chairman Wicker. He said earlier this month that he hopes “to preview a bipartisan product in the coming weeks.” • In addition, Senators Moran and Blumenthal will continue working on their own bipartisan bill. They said that they intend to introduce this legislation by the end of the year. <p>House Energy and Commerce (“E&C”) Committee</p> <ul style="list-style-type: none"> • We expect another hearing in the fall to discuss any legislative proposals that are introduced after August recess. This would follow two E&C hearings so far – one featuring industry and consumer views, and another with all five FTC commissioners testifying. • Discussions in House E&C seem slower and further apart than in Senate Commerce, and committee members don’t appear to be engaging across the aisle. Rep. Janice Schakowsky (D-IL) suggested that she’s open to moving forward on legislation without Republican support. • Chairman Frank Pallone (D-NJ), Rep. Schakowsky, Ranking Member Greg Walden (R-OR), and Rep. Cathy McMorris Rodgers (R-WA) have been the most active on the committee, though Reps. Anna Eshoo (D-CA) and Zoe Lofgren (D-CA) are working on their own privacy bill that would create a CFPB-like privacy regulator called the U.S. Digital Privacy Agency. Both Eshoo and Lofgren represent parts of Silicon Valley and are eager to claim ownership of the legislation. However, Chairman Pallone and Rep. Schakowsky will continue to drive the E&C committee process. <p>Senate Banking Committee</p> <ul style="list-style-type: none"> • Chairman Mike Crapo (R-ID) and Ranking Member Sherrod Brown (D-OH) are focusing on privacy rights in the context of the use and sharing of consumer data to market, underwrite, and offer financial services like credit and insurance. The committee has been very deliberate in its approach, circulating requests for |

information and holding hearings to get input from a variety of stakeholders. We expect bipartisan draft legislation to be introduced in the fall and an accompanying committee hearing if Crapo and Brown continue to make progress.

- Legislation from Senate Banking will have to amend GLBA, FCRA, and ECOA, the three existing federal data privacy-focused laws under its jurisdiction. Chairman Crapo and Ranking Member Brown are evaluating reforms to these statutes to reach data brokers and data aggregators.
- The recent hearing on Facebook’s Libra highlighted Crapo and Brown’s attention to privacy vis-à-vis financial stability, competition, consumer protection, data aggregation, and technology companies offering financial services. At the hearing, Chairman Crapo outlined his vision for a federal privacy law, calling for (1) GDPR-like obligations for data collectors, brokers, and users; (2) an enforcement system to prevent abuse; and (3) consumer privacy rights around disclosure and informed consent, notification over data collection and use, and opt-in/out. This was preceded by a June hearing focusing on alternative “consumer scores” and data brokers – there was bipartisan agreement that FCRA should be expanded to regulate both.
- We expect oversight hearings this fall with entities involved in the recent Capital One breach.

House Financial Services Committee

- Data privacy has not been a priority issue for Chairwoman Maxine Waters (D-CA). Legislation from the committee would likely focus more narrowly on credit bureau reform or data breach notification.
- A February committee hearing discussed two of Chairwoman Waters’ legislative proposals – one nearly 200 pages long that would make sweeping reforms to the credit reporting industry and another to protect consumers adversely impacted by a government shutdown. These bills are good markers for potential legislation that could be palatable for Chairman Crapo, who has also expressed interest in credit bureau reform.
- Following the Equifax breach, committee members of both parties have been critical of the credit reporting industry. Chairwoman Waters has spent a significant amount of the Committee’s time focused on potential credit reporting industry reforms, and Ranking Member Patrick McHenry (R-NC) called the industry “an oligopoly.” Despite bipartisan agreement that the industry is broken, there has been little agreement so far on how to fix it and Congress has been unable to pass any legislative response since the 2017 breach. Chairwoman Waters has held several hearings and marked up several bills on the topic, but none have been bipartisan. Ranking Member McHenry recently introduced H.R. 3821 to put forward a marker for changes that House Republicans could support. The bill would amend FCRA to reform the credit reporting agencies.

Senate and House Judiciary Committees

- Chairman Lindsay Graham (R-SC) declared at a Senate Judiciary hearing in March that any major privacy legislation must go through him and the committee due to its jurisdiction. The Senate Judiciary and Commerce committees held their high-profile joint hearing with Facebook CEO Mark Zuckerberg in April 2018 for the same reason. Judiciary’s foray into the legislative process adds yet another cook to the kitchen, further complicating the odds that a federal privacy bill reaches the President’s desk and is signed into law.
- These committees are likely to focus on privacy in the context of Big Tech antitrust, online platforms, and content moderation and liability, in addition to data control, ownership, and sharing. Senators Marsha Blackburn (R-TN) and Dianne Feinstein (D-CA) are leading the Senate Judiciary Committee’s Tech Task

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| | <p>Force, which has been holding separate hearings on privacy security, censorship, antitrust, and competition. On the other side of the Capitol, the House Judiciary Committee is expected to hold a hearing in September on antitrust and competition on data.</p> |
| <p>THE ADMINISTRATION</p> | <p>The White House announced in July 2018 that the National Economic Council (NEC) was working on a data privacy blueprint that outlined its priorities and could be used as the basis for federal legislation. The NEC has met with numerous industry and consumer stakeholders since then but has not released its proposal or offered guidance on what it would deem acceptable in a bill. The White House recently held a Social Media Summit where President Trump praised Senator Josh Hawley (R-MO) for working on “some very important legislation,” though he didn’t endorse any specific measures.</p> <p>Last year, the Treasury Department tackled several privacy related issues in its Core Principles Report, “<i>A Financial System That Creates Economic Opportunity: Nonbank Financials, Fintech, and Innovation</i>”. The report recommended expanding consumer rights related to financial data, and establishing federal breach notification and data security standards.</p> <p>In March, the Federal Trade Commission (FTC) announced that it was seeking comment on proposed changes to GLBA’s Safeguards Rule and Privacy Rule. The Safeguards Rule requires financial institutions to develop, implement, and maintain comprehensive information security programs to protect their customers’ personal information, while the Privacy Rule requires financial institutions to inform customers about their information-sharing practices and allow customers to opt out of having their information shared with certain third parties. The FTC extended the comment period for the proposed changes to the Safeguards Rule to August 2nd, while the comment deadline for the Privacy Rule already passed on June 3rd.</p> <p>A major development on enforcement action has been the Federal Trade Commission’s (FTC) settlement and landmark \$5 billion fine against Facebook for misusing users’ personal information amid the Cambridge Analytica scandal. The fine is subject to approval from DOJ. This easily exceeds Google’s \$22.5 million fine in 2012, which then held the record for the largest FTC fine against a technology company. The Republican-majority commission voted 3-2 to approve the fine, with Democrats dissenting because they sought higher penalties and stricter limits on Facebook’s ability to collect and share data with third parties. The settlement is significant in that it represents one of the most aggressive regulatory actions by the Trump administration, sets the bar for future privacy enforcement, and provides a blueprint for regulation around privacy obligations, governance reform, and third-party reporting. However, this will not ease the scrutiny from Washington – many Democrats like Senators Mark Warner (D-VA) and Blumenthal have insisted that deeper structural reforms are still needed with respect to personal data and the spread of misinformation. The FTC is also pursuing an antitrust investigation of Amazon, while the DOJ is investigating Google and Apple.</p> <p>A federal privacy law could also grant the FTC additional funding and traditional notice-and-comment rulemaking authority, in addition to stronger enforcement powers and the authority to levy civil penalties for first-time offenses. This independent agency enforces existing privacy laws like GLBA and could be empowered to become the primary enforcement agency presiding over consumer data privacy in a new federal regime. Notably, all five FTC commissioners including Chairman Joseph Simons called for expanded FTC powers and a national privacy law at a House E&C hearing in May. Such a bill could also give state attorneys general enforcement authority over a federal privacy law within their respective states.</p> |

IMPACT ON FINANCIAL SERVICES SECTOR

Over the last decade, the financial services sector has largely focused on data breach notification and data security policy on Capitol Hill. In the aftermath of California's landmark privacy legislation in 2002 and major breaches at large retailers, financial services companies sought federal preemption of state breach notification laws and a GLBA-like standard for other parts of the economy holding financial data. To date, these efforts have zeroed in on privacy responsibilities under the GLBA framework.

A number of factors have pushed the privacy discussion to new areas that may impact financial services companies. The rise and use of big data has caused increased scrutiny of partnerships between the financial services sector and Big Tech. The Equifax breach has brought a focus on the vulnerability of having data concentrated in a few companies. Finally, major privacy laws in Europe and in California have changed the narrative of the debate. As a result, financial services companies need to think through policy vulnerabilities in new ways.

For example, Chairman Crapo and Ranking Member Brown have voiced concerns about new ways that data is being used in the financial services sector, and they have questioned whether the existing regulatory framework is sufficient to protect consumers and the financial system. These concerns go well beyond preemption of breach notification and data security standards. They are focused on the fundamental rights around the use, storage, access, disclosure, and sharing of data.

Financial services companies should evaluate their existing privacy duties and responsibilities under the Fair Credit Reporting Act, Equal Credit Opportunity Act, and Gramm-Leach-Bliley Act. They should also evaluate their vendor management responsibilities through a privacy lens.

Our view is that narrow, bipartisan privacy legislation could emerge this Congress from the Senate Banking Committee, and ultimately serve as a vehicle for passing some privacy legislation. We would expect Crapo and Brown to amend the FCRA, ECOA, and GLBA to address how non-financial data (e.g. character and reputational data) held by non-financial third parties is bought, collected, and used by financial services companies. Further, we would expect Crapo and Brown to broaden the reach of these statutes to not only cover the data being transmitted along these channels, but the non-financial companies engaging in the activity.