



# Watching the Watchers: A Comparison of Privacy Bills in the 116<sup>th</sup> Congress

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As a [growing number of states](#) enact or consider consumer privacy protection measures, many in Congress [are pushing for](#) a comprehensive federal consumer privacy framework. In 2019, both the [Senate Committee on Commerce, Science, and Transportation](#) and the House Energy and Commerce Committee's [Subcommittee on Consumer Protection and Commerce](#) held hearings on protecting consumer privacy. And in the last few months, Members of Congress have introduced four consumer privacy bills and circulated discussion drafts of two additional proposals:

- [H.R. 4978, the Online Privacy Act of 2019](#), introduced by Representatives Anna Eshoo and Zoe Lofgren on November 5, 2019;
- The United States Consumer Data Privacy Act of 2019 ("[USCDPA Draft](#)"), a discussion draft [circulated by](#) Senator Roger Wicker on November 27, 2019;
- [S. 2968, the Consumer Online Privacy Rights Act](#), introduced by Senators Maria Cantwell, Brian Schatz, Amy Klobuchar, and Ed Markey on December 3, 2019;
- An untitled December 18, 2019, discussion draft ("E&C Draft") from the House Energy and Commerce Committee, [spearheaded by](#) Representatives Cathy McMorris-Rodgers and Jan Schakowsky;
- [S. 3300, the Data Protection Act of 2020](#), introduced by Senator Kirsten Gillibrand on February 13, 2020; and
- [S. 3456, the Consumer Data Privacy and Security Act of 2020](#), introduced by Senator Jerry Moran on March 12, 2020.

Five of the six proposals—H.R. 4978, S. 2968, S. 3456, and the two discussion drafts—take similar approaches. Although details vary somewhat from bill to bill, each regulates the use of personal information by: (1) recognizing individuals' rights to control their personal information; (2) requiring a defined class of entities to take steps to respect those rights; and (3) creating procedures to enforce those requirements. The five proposals differ, however, in three key respects: (1) which federal agency would have enforcement power; (2) whether to preempt state privacy laws; and (3) whether to provide a private right of action. The sixth bill, S. 3300, takes a different approach: it would create a new agency vested

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with the power to enforce existing federal privacy laws and authorize that agency to issue broadly applicable privacy regulations.

This Sidebar highlights the main components of and key differences between these proposals before identifying several issues for the 116<sup>th</sup> Congress.

## Main Components

The six proposals share a number of components. Each bill defines the type of information it would protect (*covered* or *personal information* or *data*) in similar terms, with most including information that is linked or reasonably linkable to an individual. Many of the proposals (the USCDPA Draft, [S. 2968](#), the E&C Draft, and [S. 3456](#)) would provide additional protections for *sensitive* information, including government-issued identification numbers, financial account numbers, health records, biometric data, and geolocation data.

Likewise, each bill specifies the type of entities it would cover, though the breadth of this coverage varies. [S. 2986](#) would cover only entities or persons subject to the [Federal Trade Commission Act](#), excluding small businesses. Conversely, [S. 3300](#) would apply to any “person” (which, under existing law, would include corporations and other businesses) “that collects, processes, or otherwise obtains personal data with the exception of an individual processing personal data in the course of personal or household activity.” Some bills ([H.R. 4978](#), [S. 2968](#), [S. 3456](#)) would exempt certain types of entities, in whole or in part, such as small businesses and entities engaged in journalism. In addition, some bills (the USCDPA Draft, [S. 2968](#), [S. 3300](#)) would impose additional restrictions on *large data holders* that exceed certain revenue thresholds or process the covered information of a specified number of individuals.

The six proposals also specify which agency would be responsible for enforcing the new laws, offering two main approaches. Most bills would either vest the Federal Trade Commission with enforcement authority (the USCDPA Draft, [S. 3456](#)) or create a new bureau within that agency ([S. 2968](#), E&C Draft). Two bills, however—[H.R. 4978](#) and [S. 3300](#)—would create new agencies to oversee privacy requirements.

## Individual Rights and Covered Entities’ Duties

Five of the proposals—[H.R. 4978](#), [S. 2968](#), [S. 3456](#), and the two discussion drafts—take a similar substantive approach, creating protections for covered information that are enumerated as individual rights and covered entity duties. Although each bill uses different terminology—certain protections appear as *rights* in some bills and *duties* in others—and would recognize a slightly different set of rights and duties, some protections are common to all five proposals. **Table 1** identifies selected protections under each of these five proposals.

First, each of these five proposals ([H.R. 4978](#), [S. 2968](#), [S. 3456](#), and the two discussion drafts) would recognize a core set of individual rights with respect to covered information held by covered entities. The *right of access* would give individuals the right to view their covered data held by covered entities, a list of third parties to which that data had been transferred, and the purposes of any such transfers. The *right of deletion* would allow an individual to request that covered entities delete (or, under some bills, de-identify) any of that individual’s covered information, with some exceptions. The *right of correction* would give individuals the ability to correct—or require a covered entity to correct—inaccurate information. The *right of portability* would require covered entities to provide individuals, on request, with copies of their data free from any restrictions on use. And the *right of information* (also called the *right of transparency* or the *right to know*) would require a covered entity to provide individuals with copies of the entity’s privacy policy, as well as any updates to the privacy policy.

Second, each proposal would create [notice and consent](#) requirements for how covered entities would use covered information. Under these requirements, a covered entity would have to [notify](#) an individual when it intends to collect or transfer information. The entity would then have to ask the individual for affirmative consent ([opt in](#)) or give the individual a chance to [opt out](#) of the collection or transfer.

Finally, each of these five proposals would require covered entities to limit how they collect and use covered information and to take certain steps to safeguard that information. The duty of [minimization](#) would limit a covered entity’s collection, processing, and transfer of covered information to no more than it reasonably needs to provide the product or service that an individual requested. Complementing that duty, covered entities would be required to safeguard covered information in their possession by implementing physical security and cybersecurity policies.

**Table I. Selected Protections in Pending Privacy Legislation**

	H.R. 4978	USCDPA Draft	S. 2968	E&C Draft	S. 3456
Right of Access	§ 101	§ 103(a)(1)(A)	§ 102(a)	§ 5(a)(2)	§ 5(b)
Right of Correction	§ 102	§ 103(a)(1)(B)	§ 104	§ 5(a)(3)	§ 5(c)
Right of Deletion	§ 103	§ 103(a)(1)(C)	§ 103	§ 5(a)(5)	§ 5(d)
Right of Portability	§ 104	§ 103(a)(1)(D)	§ 105(a)	—	§ 5(b)(2)(B)
Right of Information	§ 107	§ 102	§ 102(b)	§ 3(a)(1)	§ 4
Notice Requirements	§§ 212(a), 213	§ 102	§ 102(b)	§ 3(a)(1)	§ 3(b)(2)
Opt-Out Consent	§ 212(b)(2)	§ 104(d)	§ 105(b)	§ 6(c)	§ 3(b)(1)(A)
Opt-In Consent	§ 212(b)(1)	§ 104(a)	§ 105(c)	§ 6(d)	§ 3(b)(1)(B)
Minimization	§ 201	§ 105	§ 106	§ 7(a)(1)	§ 3(d)
Data Security	§ 214	§ 204	§ 107	§ 9	§ 6

**Source:** CRS, using information from H.R. 4978, the USCDPA Draft, S. 2968, the E&C Draft, and S. 3456.

## An Alternative Approach: S. 3300

Compared to the other five proposals, S. 3300 would take a markedly different approach: it would not impose any new privacy obligations on covered entities. Instead, the bill [would centralize](#) all privacy oversight and enforcement responsibilities for existing, sector-specific laws—such as Title V of the [Gramm-Leach Bliley Act](#) (Pub. L. No. 106-102) and the [Children’s Online Privacy Protection Act of 1998](#) (Pub. L. No. 105-277)—in a new [Data Protection Agency](#). S. 3300 would also authorize the agency to [issue regulations](#) to [prevent](#) “unfair or deceptive act[s] or practice[s] . . . in connection with the collection, disclosure, processing, and misuse of personal data.”

## Key Differences

Although the bills are similar in many respects, they contain two major areas of divergence that may make it difficult for Congress to reach consensus: whether to include a private right of action and whether to preempt state law.

Two of the bills—[H.R. 4978](#) and [S. 2968](#)—would provide a *private right of action* for an individual to challenge, in court, a covered entity’s collection or use of that individual’s covered information. (For a discussion of the constitutionality of private rights of action in this space, see [CRS Legal Sidebar](#)

[LSB10303](#), *Enforcing Federal Privacy Law—Constitutional Limitations on Private Rights of Action*, coordinated by Chris D. Linebaugh.) Both bills would also allow an individual to seek [damages](#) for harm caused by the covered entity’s use of the individual’s information. In contrast, three bills—the USCDPA Draft, S. 3300, and S. 3456—would not create a new private right of action, instead relying on the oversight agency and state attorneys general to enforce the bills’ provisions. The E&C Draft includes a placeholder heading for private rights of action without any specific requirements.

Similarly, the proposals are split on whether to preempt state privacy laws expressly, such as the [California Consumer Privacy Act \(CCPA\)](#). (For more information on preemption, see [CRS Report R45825](#), *Federal Preemption: A Legal Primer*, by Jay B. Sykes and Nicole Vanatko; for a discussion on the CCPA, see [CRS Legal Sidebar LSB10213](#), *California Dreamin’ of Privacy Regulation: The California Consumer Privacy Act and Congress*, coordinated by Eric N. Holmes.) Two of the bills—the USCDPA Draft and [S. 3456](#)—would expressly preempt state law, though S. 3456 contains a number of [exceptions](#) for state laws that relate to other federal sector-specific privacy laws, such as the [Gramm-Leach Bliley Act](#) and the Health Insurance Portability and Accountability Act of 1996 ([Pub. L. No. 104-191](#)). Two of the bills—[S. 2968](#) and [S. 3300](#)—would explicitly *preserve* state laws and would only preempt state laws to the extent they conflict with those bills. Finally, neither H.R. 4978 nor the E&C Draft states whether they would preempt or preserve state laws. (The E&C Draft again has a placeholder heading.)

**Table 2** summarizes these differences.

**Table 2. Major Differences in Pending Privacy Legislation**

	H.R. 4978	USCDPA Draft	S. 2968	E&C Draft	S. 3300	S. 3456
Private Right of Action	Yes ( <a href="#">§ 407</a> )	No	Yes ( <a href="#">§ 301(c)</a> )	Not specified	No	No
State Law Preemption	Not specified	Yes ( <a href="#">§ 404</a> )	Only direct conflicts ( <a href="#">§ 302(c)</a> )	Not specified	Only direct conflicts ( <a href="#">§ 10(a)</a> )	Yes, with exceptions ( <a href="#">§ 10(a)</a> )

**Source:** CRS, using information from H.R. 4978, the USCDPA Draft, S. 2968, the E&C Draft, S. 3300, and S. 3456.

## Issues for the 116<sup>th</sup> Congress

Although the proposals are similar in many respects, they differ in key ways, including whether the new federal laws would preempt state law and whether individuals would have a private right of action to enforce the law. As several news outlets have discussed, these “[key sticking point\[s\]](#)” make it “[unclear if there is any path forward for privacy legislation.](#)”

A dispute over whether to include a private right of action has [prevented the passage](#) of Washington State’s privacy bill, and disagreement on this point could lead to a similar result in Congress. The preemption issue relates to a more time-sensitive concern: whether Congress seeks to guide the national debate on privacy laws, rather than respond to it. California is [working to implement](#) the CCPA, and [more than a dozen states](#) continue to develop their own privacy legislation. Until Congress provides direction through a federal bill—whether or not it preempts state law—it seems likely that states will develop a patchwork of laws that may [be inconsistent and difficult](#) for businesses to navigate.

Some Members [have indicated](#) that there is room for continued negotiation, though others seem less hopeful. Ultimately, unless Congress comes to an agreement on these two core issues, it may be unlikely that any of these proposals will gain traction.

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