

Online Privacy Bill Calls For Fines, Consumers' Right To Sue

By Andrew Kragie

Law360 (November 26, 2019, 8:21 PM EST) -- A Senate bill unveiled Tuesday would give consumers rights echoing those granted in California and the [European Union](#), create a new [Federal Trade Commission](#) privacy bureau that could seek fines for first offenses and allow states and individuals to pursue privacy claims in federal court.

The bill, sponsored by four senior Senate Democrats, would establish a "duty of loyalty" when companies handle consumer data and give users the right to see, correct and delete information about themselves. The private right of action would invalidate predispute arbitration agreements and allow punitive damages along with potentially massive fines between \$100 and \$1,000 per user per day.

The bill's text was published Tuesday by the measure's lead sponsor, Sen. Maria Cantwell, D-Wash., a onetime tech executive who is now the top Democrat on the Senate Commerce Committee. The other original sponsors — Democratic Sens. Brian Schatz of Hawaii, Amy Klobuchar of Minnesota and Ed Markey of Massachusetts — are ranking members of related committees.

"In the growing online world, consumers deserve two things: privacy rights and a strong law to enforce them," Cantwell said in a statement. "They should be like your Miranda rights: clear as a bell as to what they are and what constitutes a violation."

If Cantwell's bill became law, consumers would have to opt in to let companies process and transfer sensitive data, broadly defined to cover Social Security numbers, health information, credit card data, email addresses, browsing history, precise location data and intimate images.

A privacy expert with the nonprofit Consumer Reports said this broad definition might be the bill's most significant feature.

"Probably the biggest change is that the bill has a very broad definition of 'sensitive data' requiring affirmative permission," Justin Brookman told

Law360 in an email. "This now includes cross-site and -app data collection, so companies would no longer be able to sell and share with dozens (or hundreds) of ad tech companies by default. They'd need permission first."

Companies also would have to give consumers an easy way to opt out of giving non-sensitive information, and they would not be allowed to target advertising based on protected characteristics including race and gender.

Chief executives, along with top privacy and data security officers, would have to submit annual certifications to the FTC that their companies are complying with the bill's requirements, which would apply to businesses that process data from at least 100,000 users, bring in more than \$25 million annually and earn at least half that revenue from transferring consumer data.

The measure would allow states to create their own digital privacy regimes so long as there's no direct conflict with the federal law. Julian Sanchez, a senior fellow at the libertarian-leaning [Cato Institute](#), told Law360 in an email that this provision "means instead of establishing one clear, uniform set of rules, you'll end up with 51."

Consumer advocates lauded the legislation.

"Requiring consent for much (if not most) data sharing would be a huge change," Consumer Reports' Brookman told Law360 in an email. "The bill also expands enforcement, including a private right of action that could deter potential wrongdoers who today for the most part only have to worry about a small and relatively underpowered FTC."

Brookman said he would like to see a nondiscrimination provision that banned treating consumers worse when they opt out of data sharing.

The [Electronic Privacy Information Center](#) gave Cantwell's bill a grade of A- because it does not call for creating a standalone privacy agency. The nonprofit's policy director, Caitriona Fitzgerald, called the measure "outstanding" because it "gives consumers meaningful rights, holds companies accountable and protects stronger state safeguards. The only bill to get a higher EPIC grade is the [Online Privacy Act](#), proposed by two California Democrats in the House.

Industry groups withheld their endorsements.

A coalition of advertisers, Privacy for America, praised the Senate measure as a "thoughtful contribution," but expressed concern that "the bill would allow a patchwork of state laws and not produce the strong, single set of consumer protections that would preserve the economies of scale, consumer benefits and innovation that accompany the responsible use of data."

A software industry group approved of one aspect but not the entire bill.

"We're pleased the bill recognizes the distinct role of service providers so consumers have clarity about how to exercise their rights," Craig Albright of BSA | The Software Alliance said in a statement. "We don't agree with everything in this bill [but will work with] lawmakers on a strong federal privacy law that is worthy of being the one clear national standard."

A visiting scholar with the right-leaning [American Enterprise Institute](#) took issue with the bill's overall strategy.

"The rights-based approach is wrong because the information is not discrete or divisible," Roslyn Layton told Law360 in an email. "Moreover we can see from the [E.U. privacy regime] that the rate that users exercise their rights is low. This is extremely high cost to impose on business to satisfy the privacy elite." Layton praised the exemption for small businesses but suggested the minimum revenue threshold be raised from \$25 million.

The Cato Institute's Sanchez warned that the bill calls for delegating broad definitional power to executive agencies and the courts by using what he called "fuzzy" terms such as "inconsistent with the expectations of a reasonable individual."

Sanchez suggested one unintended consequence of online privacy legislation could be further cementing digital monopolies, since compliance costs would create another barrier to entry, while different websites owned by the same tech titan might be able to share consumer data without running afoul of "third party" rules.

With only Democratic sponsors, Cantwell's bill faces long odds of passing the GOP-controlled Senate. Major legislative changes outside of normal budget processes may not make it through the divided Congress until 2021.

The Senate Commerce Committee has set a Dec. 4 hearing to discuss online privacy legislation with representatives from [Microsoft](#), [Walmart](#) and advocacy groups.