

A Look Ahead at Federal Regulation

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Regulatory Focus on Data Privacy Grows

By Lisa Singh

The enactment of more stringent data privacy laws by states and foreign governments is prompting a more unified approach by the federal government, beyond the industry-specific regulations that dictated past approaches.

“At the federal level, a parade of principles, frameworks, and comments is moving on to concrete drafting by members of Congress as well as stakeholders,” said Cameron Kerry, former general counsel for the Commerce Department and current data privacy expert with the Brookings Institution. “We’ll see a lot more of that as the next Congress gets rolling.”

Roger Wicker (R-Miss.), the probable incoming chairman of the Senate Commerce Committee, has been working on a bipartisan effort with Sens. Jerry Moran (R-Kan.), Richard Blumenthal (D-Conn.), and Brian Schatz (D-Hawaii) to advance online privacy legislation. On the House side, Rep. Frank Pallone (D-N.J.) is leading a similar effort with Rep. Jerrold Nadler (D-N.Y.).

Congressional response follows the European Union’s May 2018 implementation of the General Data Protection Regulation.

“Any law enacted federally is likely to try to harmonize with [GDPR] at least a bit,” said Margot Kaminski, a professor at the University of Colorado Law School.

Passage of the California Consumer Privacy Act, slated for full implementation in January 2020, is adding to the urgency for federal response.

“Congress has been unsuccessful in passing a uniform data breach notification requirement and instead has allowed varying standards to proliferate in 50 states and various territories,” said Michelle Reed, co-head of Akin Gump Strauss Hauer & Feld’s cybersecurity, privacy, and data protection practice. The passage of CCPA may be a tipping point. “With the CCPA looming on the horizon, Congress has a verifiable deadline to pass legislation, or it will allow California’s to become the de facto privacy law of the nation.”

Until then, the federal government will continue to see new stakeholders dictate data privacy norms.

“The federal government typically leads in this area, with state attorneys generally taking on heavier enforcement burdens, often along the same path created by federal regulators like the Federal Trade Commission and Health and Human Services,” said Woodrow Hartzog, a professor of law and computer science at Northeastern University’s School of Law. “Lately, however, we have seen some notable exceptions.”

Several state data protection laws break new ground.

Beyond California, Vermont recently passed legislation that regulates how data brokers, such as Experian and Equifax, can buy and sell personal information. Meanwhile, Colorado’s new consumer data protection law requires businesses to maintain a written data management policy and notify consumers within a month of a breach, and New York’s new cybersecurity regulation adds requirements on financial industries. While all states have data breach notification laws, many of these measures break new ground.

“In the relatively few cases where state privacy laws outright contradict federal laws, the state laws are usually preempted by federal law,” said Lothar Determann, a privacy partner with Baker McKenzie. “More commonly, however, states legislate on privacy concerns that have not yet been addressed by federal law.”

So far, congressional leaders have not reached consensus about whether to preempt state regulations, notably the CCPA, according to Bloomberg Law. Partisan disagreement also remains about how much authority the Federal Trade Commission should hold in data privacy protections, reports Bloomberg’s Daniel R. Stoller. Yet few argue for industry self-regulation anymore, as high-profile cyber breaches are a common occurrence.

“Voluntary standards or self-regulatory processes will be insufficient to protect consumers,” said Nuala O’Connor, president and chief executive of the Center for Democracy and Technology. Technology companies and their advocates are ceding this point, in a preemptive rush against varying state response.

“If someone uses Wi-Fi at Los Angeles International Airport, on a flight, and then at a Newark airport, their data privacy and protections shouldn’t be different on each network as they travel,” said Melika Carroll, senior vice president of global government affairs at the Internet Association.

Congressional leaders disagree on whether to preempt state regulations, according to Bloomberg Law.

Last September, the National Institute of Standards and Technology launched an initiative to develop new consumer guidelines. Simultaneously, the National Telecommunications and Information Administration requested industry insights into ways to balance consumer privacy with technology innovation.

“We’re seeing the U.S. Chamber of Commerce, Business Roundtable, and other industry players leaning forward on protections like rights of access, correction, deletion—things that would have provoked strong business opposition not long ago,” Kerry of the Brookings Institution said.

However, it remains in question what regulatory body will lead in any unifying effort to shore up data privacy on a national level.

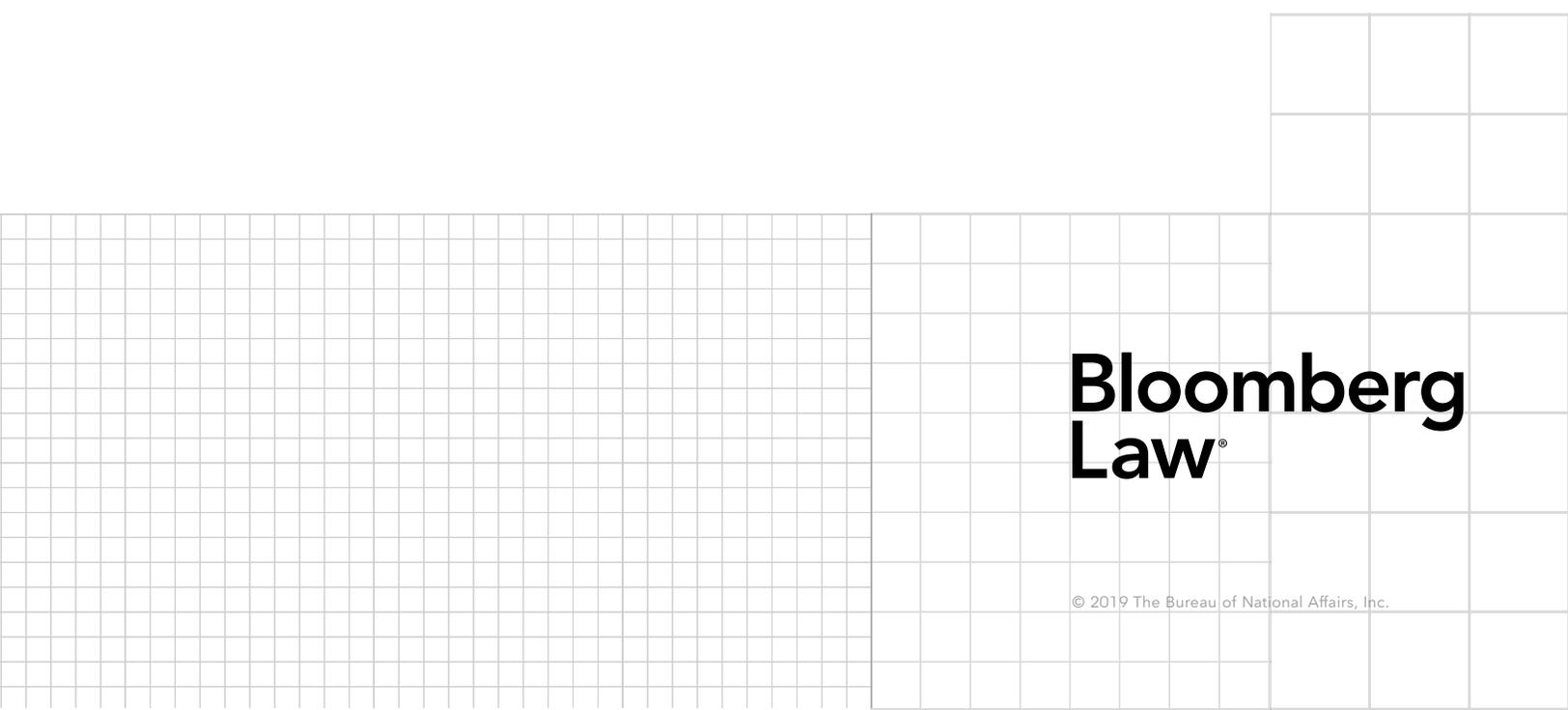
“States are following what is going on in Washington with intense interest,” O’Connor said, “but the proliferation of different privacy discussions going on in Congress, the Trump administration, and at the NTIA, NIST, and the FTC can make it difficult to say who is in the proverbial driver’s seat.”

Federal response is inevitable, experts say. In the meantime, current laws are setting the stage for de facto standards.

“Whatever the outcomes, data management begins with getting a handle on what data is being collected and what happens with it,” Kerry said.

“Even if this doesn’t require the full-scale data mapping employed by GDPR, any company needs to know what its high-value and high-risk data is—and how that data is handled and protected.”

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