Quick Reference Comparison
Cantwell and Three Corners Federal Privacy Drafts
June 6, 2022

SUMMARY

Sen. Cantwell and the Three Corners (Sen. Wicker & Reps. Pallone and McMorris Rogers) both introduced discussion drafts of federal privacy legislation. The drafts are harmonized on several major issues: both would preempt state law and allow for enforcement by the FTC, state AGs, and private citizens. Additionally, both bills would create a meaningful regime of privacy protections for individuals and specific categories of sensitive data, placing restrictions on the use of data as well as the types of consent needed to use personal information.

In several places, the Three Corners draft goes significantly further than the Cantwell bill:

- Prohibits certain practices by data brokers, requires data broker registration at the FTC, and provides consumers one-click data deletion from data brokers
- Restricts collection, processing, transfer of certain sensitive data (e.g. SSNs and geolocation) when the transfer could harm consumers
- Extends explicit protections to children (under 13) and minors (under 17) and prohibits targeted advertising to minors

The Cantwell draft provides a much more rigorous protection for the private right of action and restricts forced arbitration.

The most meaningful areas of disagreement are in what rights to give to individuals who would bring individual litigation against Covered Entities. While Sen. Cantwell's bill would allow immediate rights to sue, the Three Corners bill would delay the right for 4 years. In addition, while Sen. Cantwell would ban arbitration for a set of serious privacy harms and civil rights violations, the Three Corners bill would only restrict arbitration for individuals under 18.

Both drafts contain substantially similar provisions on field preemption, executive liability, coverage of common carriers, and limitations on data use.

Areas of concerns remain: the definitions of "Covered Entity," "Service Provider," and "Large Data Holder" overlap, meaning a single company could be subject to multiple sets of obligations depending on its business model. Definitions are not harmonized with existing state law or the EU's GDPR.

Below is a brief summary of key sections of the bill, including definitions, responsibilities, corporate responsibility, enforcement, and preemption.

CONTENTS

KEY DEFINITIONS

Affirmative Express Consent

Cantwell:	An affirmative act by an individual that "clearly communicates" consent in response to a specific request from a covered entity. Request must be standalone and describe the specific data and practices for which consent is sought, including a description of what practices are necessary and which are for other purposes. Prohibits consent by inference or continued use of service. (Sec. 1).
Three Corners:	Substantially similar. Prohibits consent obtained by manipulation or so-called Dark Patterns. Includes additional technical and clarifying language. (Sec. 1).

Collect; Collection

Cantwell:	Broad prohibition on buying, renting, collecting, or other means of obtaining covered data. (Sec. 4).
Three Corners:	Identical. (Sec. 4).

Covered Data

Cantwell:	Any data that identifies or is reasonably linked to an individual or device. Includes derived data and unique identifiers. Excludes de-identified data, employee data, and publicly available data. (Sec. 8).
Three Corners:	Identical except additionally defines employee data. (Sec. 8).

Covered Entity

Cantwell:	Any entity that processes or transfers covered data and is subject to FTC jurisdiction, is a common carrier, or is a nonprofit. (Sec. 9).
Three Corners:	Same coverage except collection of data is also a trigger for coverage. (Sec. 9).

Large Data Holder

Cantwell: Any covered entity that also processed or transferred covered data of more than 5 million individuals or devices in a year or the same for the sensitive information of 100,000 individuals or devices. Excludes account information from sensitive information handling. (Sec. 16).

Three Corners: Substantially similar except includes revenue requirement of $250 million and collection of data as a trigger. (Sec. 17).

Service Provider

Cantwell: A subset of covered entity that processes or transfers data on behalf of another covered entity insofar as the actions the service provider takes are to perform the service for the other covered entity. (Sec. 21).

Three Corners: Substantially similar except also includes collecting data on behalf of the other covered entity. (Sec. 23).

Substantial Privacy Harm

Cantwell: Harm involves over $1,000 of financial harm, or serious physical or mental harm. Also includes serious intrusion upon seclusion of an individual. These types of harms would not be subject to arbitration.

Three Corners: Not included.

Third Party

Cantwell: Any person or entity other than a service provider that processes data. Excludes entities with common branding. (Sec. 25).

Three Corners: Similar except includes collection as a trigger and includes large data holders as third parties even under common branding. (Sec. 27).

Third-Party Collecting Entity

Cantwell: Not included.

Three Corners: Subset of covered entity that either makes more than 50% of its revenue or makes any revenue by processing the data of more than 5 million individuals where the entity did not collect the data directly from those individuals. Excludes service providers. (Sec. 28).

Transfer

Cantwell: Any disclosure, dissemination, or license of data for consideration or a commercial purpose. (Sec. 27).

Three Corners: Any disclosure, dissemination, or license of data regardless of consideration or commercial purpose. (Sec. 30).

KEY OBLIGATIONS

Prohibition on Deceptive and Harmful Data Practices
Applies to Covered Entities

Cantwell: Prohibits certain deceptive and harmful data practices. (Sec. 101).

Three Corners: Not included.

Data Minimization
Applies to Covered Entities

Cantwell: Must only process and transfer data as necessary and reasonable to provide services requested or expected by customer. (Sec. 102).

Three Corners: Substantially similar and additionally includes prohibition on collection and requires FTC to provide guidance on reasonability and compliance. (Sec. 101).

Loyalty Duties
Applies to Everyone

Cantwell: Not included.

Three Corners: Prohibits collection, transfer, and processing of certain sensitive information, such as SSN, geolocation, biometric, password, nonconsensual nudity, and genetic information. (Sec. 102).

Privacy By Design
Applies to Covered Entities

Cantwell: Not included.

Three Corners: Must establish policies and procedures to comply with relevant laws, mitigate privacy risks to individuals under 17, and implement employee training. FTC to provide guidance. (Sec. 103).

Pricing Discrimination
Applies to Covered Entities

Cantwell: Prohibits price discrimination or refusal to offer services based on exercise of rights. Grandfathers in existing individual consent to Covered Entity data practices. (Sec. 207).

Three Corners: Substantially similar but does not grandfather existing consent and clarifies Cantwell intent that the pricing discrimination does not prohibit loyalty programs or discounts. (Sec. 104).

Transparency

Applies to Covered Entities, Large Data Holders

Cantwell: Requires published, multilingual privacy policy and contact information for privacy concerns. Prohibits changing material terms only for previously collected data without notifying consumers. Large Data Holders must provide additional, short form notice of privacy policies and data rights. FTC to promulgate minimum disclosure standards for Large Data Providers. (Sec. 201).

Three Corners: Substantially similar with a broader prohibition on changing material terms. (Sec. 202).

Individual Control
Applies to Covered Entities, Large Data Holders

Cantwell: Allows individuals to request access, correct, delete, or export their covered data. Covered Entities are required to not process requests when it cannot verify the identity of the individual or has reason to believe the request is spurious. Covered Entities may decline to process requests that they believe require retaining data longer than possible, may be impossible or impractical, interfere with law enforcement, violate law, reveal trade secrets. (Sec. 202).

Three Corners: Substantially similar and additionally requires additional guidance from FTC on compliance and does not require Covered Entities to correct data that is not demonstrably false. (Sec. 203).

Right to Consent and Object
Applies to Covered Entities, Large Data Holders

Cantwell: Prohibits the transfer of Sensitive Covered Data without affirmative consumer consent. Places standards for obtaining consent, including that it must be a clear, understandable mechanism. (Sec. 203).

Three Corners: Substantially similar and additionally requires mechanism for withdrawing consent to be as simple as that for obtaining consent. (Sec. 204).

Data Protections for Children and Minors
Applies to Covered Entities

Cantwell: Not included.

Three Corners: Prohibits targeted advertising to individuals who a Covered Entity has actual knowledge are under 17. Prohibits data transfers of individuals who a Covered Entity has actual knowledge are between 13 and 17 without Express Affirmative Consent. Establishes new Bureau in the FTC to enforce privacy and advertising provisions related to children. (Sec. 205).

Third-Party Collecting Entities
Applies to Third-Party Collecting Entities

Cantwell: Not included.

Three Corners: FTC directed to establish a published third-party collector registry listing all Third-Party Collecting Entities with contact information and description of their data process. FTC creates a "Do Not Collect" link that allows individuals to opt-out of collection and request data deletion from all registered Entities. Third-Party Collecting Entities must pay to register and face fines up to $10,000 annually for failure to register. (Sec. 206).

Civil Rights and Algorithms
Applies to Covered Entities, Large Data Holders

Cantwell: Covered Entities may not process or transfer Covered Data in a way that discriminates based on protected categories. Exceptions for self-testing and diversity efforts. Large Data Holders using algorithms must conduct impact assessment to evaluate for discrimination.

Covered Entities developing algorithms must conduct impact assessments using an external auditor and submit the results to the FTC. FTC develops guidance on Impact Assessments. FTC is empowered to refer violations of civil rights to appropriate enforcement agencies. (Sec. 204).

Three Corners: Substantially similar with additional prohibitions on collecting Covered Data. (Sec. 207).

Data Security and Protection of Covered Data
Applies to Covered Entities

Cantwell: Covered Entities must adopt data security practices to protect data. The practices must be appropriate to the size of and complexity of the Covered Entity and the nature of the data. At a minimum, Covered Entities must assess vulnerabilities and take preventative action to mitigate risk, dispose of Covered Data that is no longer necessary (except with Express Affirmative Consent), and train employees. (Sec. 205).

Three Corners: Substantially similar and additionally requires Covered Entities consider the sensitivity of the data as well as the cost of protections and technological state of the art when designing protections. Must designate an officer to implement the practices. (Sec. 208).

General Exceptions

Cantwell: Covered Entity may process or transfer data to complete transactions, perform system maintenance, and fulfil legal obligations or conduct research. Strong restrictions on transferring biometric data.

Exempts Small Data from Data Minimization (Sec. 102), Individual Control (Sec. 202), and Data Security (Sec. 205) provisions. Defined as less than $25m revenue, processes fewer than 100,000 individuals' data, and does not get more than half of its revenue from transferring data. (Sec. 206).

Three Corners: Similar exemptions but no restrictions on biometric data transfer. Exempts small business from

Exempts Small Data from Data Export (Sec. 203(a)(4)), specific vulnerability assessments (Sec. 208(b)(1)-(6)), and maintaining a Chief Privacy Officer (Sec. 301(c)). (Sec. 209).

CORPORATE ACCOUNTABILITY

Executive Responsibility
Applies to Covered Entities, Large Data Holders

Cantwell: Large Data Holders must have CEO certify that there are reasonable internal controls and reporting structures. Large Data Holders must conduct annual Privacy Impact Assessments. Covered Entities must designate privacy officers. (Sec. 301).

Three Corners: Substantially similar with greater specificity about reporting Additionally requires Large Data Holders to have at least one of the privacy officers report directly to the CEO. (Sec. 301).

Service Providers and Third Parties
Applies to Service Providers, Third Parties, Covered Entities

Cantwell: Service Providers prohibited from process data for any processing purpose that is not performed on behalf of the relevant Covered Entity. Service Providers may not transfer Covered Data except with Affirmative Consent obtained from the individual by the relevant Covered Entity. Service Providers must delete data as soon as possible after completing services.

Service Providers are exempt from individual access requests but must assist Covered Entities who are subject to requests. Must delete, de-identify, or correct data when requested by Covered Entity. (Sec. 302)

Three Corners: Substantially similar with additional prohibitions on collection of data and requiring deletion when it no longer serves legitimate purpose. (Sec. 302).

Technical Compliance Programs

Cantwell: FTC to promulgate regulations to establish a technical compliance program and guidelines for compliance. (Sec. 304).

Three Corners: Substantially similar. (Sec. 303).

Commission-Approved Compliance Guidelines
Applies to Covered Entities (Excluding Third-Party Collecting Entities)

Cantwell: Not included.

Three Corners: Allows companies to apply for safe harbor compliance certification. (Sec. 304).

ENFORCEMENT

FTC Enforcement

Cantwell: The FTC is directed to establish a new Bureau to enforce the Act. Violation of the Act is an Unfair or Deceptive Act. FTC is given authority over Common Carriers to enforce violations. Gives FTC independent litigation authority. (Sec. 401).

Three Corners: Additionally establishes an Office to provide business education and guidance. Does not provide the FTC independent litigation authority. (Sec. 401).

State AG Enforcement

Cantwell: Enables State AGs to bring suit, in which the FTC can intervene. (Sec. 402).

Three Corners: Substantially similar. (Sec. 402).

Private Enforcement

Cantwell: Establishes private right of action, which comes into force immediately. Allows recovery of actual damages, injunctive relief, attorney's fees, and equitable relief. Bars forced arbitration for Substantial Privacy Harms and violations of Civil Rights protections. Provides 30-day right to cure, except for cases that allege actual monetary damages. (Sec. 403).

Three Corners: Establishes private right of action, which comes into force 4 years after enactment. Allows recovery of compensatory damages, injunctive relief, and attorney's fees. Requires individuals to notify FTC and State AGs before bringing suit. Demands sent to Covered Entities that do not follow this process are considered Bad Faith. Requires FTC study and Report to Congress on the feasibility of ongoing Private Right of Action. Bans arbitration for individuals under 18 years old. Provides 45-day right to cure. Places procedural limitations on serving process to Covered Entities. (Sec. 403).

PREEMPTION

Cantwell: Clarifies that compliance with specific data security requirements constitutes compliance for Covered Data subject to those requirements.

Preempts all state statutory law pertaining to privacy except: Consumer protection; civil rights; employee and student privacy; breach notification; contract and torts; criminal laws for identity theft and others; cyberstalking and cyberbullying; public safety and criminal records; banking records; facial recognition; and protection of certain telephone, medical, and library records.

Preempts California's privacy laws except for sections on breach. (Sec. 404).

Three Corners: Narrower carve-out for biometric privacy laws. (Sec. 404).