

115TH CONGRESS
2D SESSION

S. _____

To establish duties for online service providers with respect to end user data that such providers collect and use.

IN THE SENATE OF THE UNITED STATES

Mr. SCHATZ (for himself, Ms. HASSAN, Mr. BENNET, Ms. DUCKWORTH, Ms. KLOBUCHAR, Mrs. MURRAY, Mr. BOOKER, Ms. CORTEZ MASTO, Mr. HEINRICH, Mr. MARKEY, Mr. BROWN, Ms. BALDWIN, Mr. JONES, Mr. MANCHIN, and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To establish duties for online service providers with respect to end user data that such providers collect and use.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Data Care Act of
5 2018”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act—

8 (1) the term “Commission” means the Federal
9 Trade Commission;

1 (2) the term “end user” means an individual
2 who engages with an online service provider or logs
3 into or uses services provided by the online service
4 provider over the internet or any other digital net-
5 work;

6 (3) the term “individual identifying data”
7 means any data that is—

8 (A) collected over the internet or any other
9 digital network; and

10 (B) linked, or reasonably linkable, to—

11 (i) a specific end user; or

12 (ii) a computing device that is associ-
13 ated with or routinely used by an end user;

14 (4) the term “online service provider” means an
15 entity that—

16 (A) is engaged in interstate commerce over
17 the internet or any other digital network; and

18 (B) in the course of business, collects indi-
19 vidual identifying data about end users, includ-
20 ing in a manner that is incidental to the busi-
21 ness conducted; and

22 (5) the term “sensitive data” means any data
23 that includes—

24 (A) a social security number;

1 (B) personal information (as defined in
2 section 1302 of the Children’s Online Privacy
3 Protection Act of 1998 (15 U.S.C. 6501)) col-
4 lected from a child (as defined in such section
5 1302);

6 (C) a driver’s license number, passport
7 number, military identification number, or any
8 other similar number issued on a government
9 document used to verify identity;

10 (D) a financial account number, credit or
11 debit card number, or any required security
12 code, access code, or password that is necessary
13 to permit access to a financial account of an in-
14 dividual;

15 (E) unique biometric data such as a finger
16 print, voice print, a retina or iris image, or any
17 other unique physical representation;

18 (F) information sufficient to access an ac-
19 count of an individual, such as user name and
20 password or email address and password;

21 (G) the first and last name of an indi-
22 vidual, or first initial and last name, or other
23 unique identifier in combination with—

24 (i) the month, day, and year of birth
25 of the individual;

1 (ii) the maiden name of the mother of
2 the individual; or

3 (iii) the past or present precise
4 geolocation of the individual;

5 (H) information that relates to—

6 (i) the past, present, or future phys-
7 ical or mental health or condition of an in-
8 dividual; or

9 (ii) the provision of health care to an
10 individual; and

11 (I) the nonpublic communications or other
12 nonpublic user-created content of an individual.

13 **SEC. 3. PROVIDER DUTIES.**

14 (a) IN GENERAL.—An online service provider shall
15 fulfill the duties of care, loyalty, and confidentiality under
16 paragraphs (1), (2), and (3), respectively, of subsection
17 (b).

18 (b) DUTIES.—

19 (1) DUTY OF CARE.—An online service provider
20 shall—

21 (A) reasonably secure individual identifying
22 data from unauthorized access; and

23 (B) subject to subsection (c), promptly in-
24 form an end user of any breach of the duty de-

1 scribed in subparagraph (A) of this paragraph
2 with respect to sensitive data of that end user.

3 (2) DUTY OF LOYALTY.—An online service pro-
4 vider may not use individual identifying data, or
5 data derived from individual identifying data, in any
6 way that—

7 (A) will benefit the online service provider
8 to the detriment of an end user; and

9 (B)(i) will result in reasonably foreseeable
10 and material physical or financial harm to an
11 end user; or

12 (ii) would be unexpected and highly offen-
13 sive to a reasonable end user.

14 (3) DUTY OF CONFIDENTIALITY.—An online
15 service provider—

16 (A) may not disclose or sell individual
17 identifying data to, or share individual identi-
18 fying data with, any other person except as con-
19 sistent with the duties of care and loyalty under
20 paragraphs (1) and (2), respectively;

21 (B) may not disclose or sell individual
22 identifying data to, or share individual identi-
23 fying data with, any other person unless that
24 person enters into a contract with the online
25 service provider that imposes on the person the

1 same duties of care, loyalty, and confidentiality
2 toward the applicable end user as are imposed
3 on the online service provider under this sub-
4 section; and

5 (C) shall take reasonable steps to ensure
6 that the practices of any person to whom the
7 online service provider discloses or sells, or with
8 whom the online service provider shares, indi-
9 vidual identifying data fulfill the duties of care,
10 loyalty, and confidentiality assumed by the per-
11 son under the contract described in subpara-
12 graph (B), including by auditing, on a regular
13 basis, the data security and data information
14 practices of any such person.

15 (c) EXPANSION OF DUTY TO INFORM REGARDING
16 BREACHES.—The Commission may promulgate regula-
17 tions under section 553 of title 5, United States Code,
18 to apply the breach notification requirement under sub-
19 section (b)(1)(B) with respect to specific categories of in-
20 dividual identifying data other than sensitive data, as the
21 Commission determines necessary.

22 (d) EXCEPTIONS.—

23 (1) REGULATIONS.—The Commission may pro-
24 mulgate regulations under section 553 of title 5,
25 United States Code, to exempt categories of online

1 service providers from the requirement under sub-
2 section (a).

3 (2) CONSIDERATIONS.—In promulgating regu-
4 lations under paragraph (1), the Commission shall
5 consider, among other factors—

6 (A) the privacy risks posed by the use of
7 individual identifying data by an online service
8 provider based on—

9 (i) the size of the provider;

10 (ii) the complexity of the offerings of
11 the provider;

12 (iii) the nature and scope of the ac-
13 tivities of the provider; and

14 (iv) the sensitivity of the consumer in-
15 formation handled by the provider; and

16 (B) the costs and benefits of applying the
17 requirement under subsection (a) to online serv-
18 ice providers with particular combinations of
19 characteristics considered under subparagraph
20 (A) of this paragraph.

21 **SEC. 4. ENFORCEMENT.**

22 (a) ENFORCEMENT BY COMMISSION.—

23 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
24 TICES.—A violation of section 3 by an online service
25 provider shall be treated as a violation of a rule de-

1 fining an unfair or deceptive act or practice pre-
2 scribed under section 18(a)(1)(B) of the Federal
3 Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

4 (2) POWERS OF COMMISSION.—

5 (A) IN GENERAL.—Except as provided in
6 subparagraph (C), the Commission shall enforce
7 this Act in the same manner, by the same
8 means, and with the same jurisdiction, powers,
9 and duties as though all applicable terms and
10 provisions of the Federal Trade Commission
11 Act (15 U.S.C. 41 et seq.) were incorporated
12 into and made a part of this Act.

13 (B) PRIVILEGES AND IMMUNITIES.—Ex-
14 cept as provided in subparagraph (C), any per-
15 son who violates section 3 shall be subject to
16 the penalties and entitled to the privileges and
17 immunities provided in the Federal Trade Com-
18 mission Act (15 U.S.C. 41 et seq.).

19 (C) NONPROFIT ORGANIZATIONS AND COM-
20 MON CARRIERS.—Notwithstanding section 4 or
21 5(a)(2) of the Federal Trade Commission Act
22 (15 U.S.C. 44, 45(a)(2)) or any jurisdictional
23 limitation of the Commission, the Commission
24 shall also enforce this Act, in the same manner

1 provided in subparagraphs (A) and (B) of this
2 paragraph, with respect to—

3 (i) organizations not organized to
4 carry on business for their own profit or
5 that of their members; and

6 (ii) common carriers subject to the
7 Communications Act of 1934 (47 U.S.C.
8 151 et seq.).

9 (3) RULEMAKING AUTHORITY.—The Commis-
10 sion shall promulgate regulations under this Act in
11 accordance with section 553 of title 5, United States
12 Code.

13 (b) ENFORCEMENT BY STATES.—

14 (1) AUTHORIZATION.—Subject to paragraph
15 (3), in any case in which the attorney general of a
16 State has reason to believe that an interest of the
17 residents of the State has been or is threatened or
18 adversely affected by the engagement of an online
19 service provider in a practice that violates section 3,
20 the attorney general of the State may, as *parens*
21 *patriae*, bring a civil action against the online service
22 provider on behalf of the residents of the State in
23 an appropriate district court of the United States to
24 obtain appropriate relief, including civil penalties in
25 the amount determined under paragraph (2).

1 (2) CIVIL PENALTIES.—An online service pro-
2 vider that is found, in an action brought under para-
3 graph (1), to have knowingly or repeatedly violated
4 section 3 shall, in addition to any other penalty oth-
5 erwise applicable to a violation of section 3, be liable
6 for a civil penalty equal to the amount calculated by
7 multiplying—

8 (A) the greater of—

9 (i) the number of days during which
10 the online service provider was not in com-
11 pliance with that section; or

12 (ii) the number of end users who were
13 harmed as a result of the violation, by

14 (B) an amount not to exceed the maximum
15 civil penalty for which a person, partnership, or
16 corporation may be liable under section
17 5(m)(1)(A) of the Federal Trade Commission
18 Act (15 U.S.C. 45(m)(1)(A)) (including any ad-
19 justments for inflation).

20 (3) RIGHTS OF FEDERAL TRADE COMMIS-
21 SION.—

22 (A) NOTICE TO FEDERAL TRADE COMMIS-
23 SION.—

24 (i) IN GENERAL.—Except as provided
25 in clause (iii), the attorney general of a

1 State shall notify the Commission in writ-
2 ing that the attorney general intends to
3 bring a civil action under paragraph (1)
4 before initiating the civil action.

5 (ii) CONTENTS.—The notification re-
6 quired under clause (i) with respect to a
7 civil action shall include a copy of the com-
8 plaint to be filed to initiate the civil action.

9 (iii) EXCEPTION.—If it is not feasible
10 for the attorney general of a State to pro-
11 vide the notification required under clause
12 (i) before initiating a civil action under
13 paragraph (1), the attorney general shall
14 notify the Commission immediately upon
15 instituting the civil action.

16 (B) INTERVENTION BY FEDERAL TRADE
17 COMMISSION.—The Commission may—

18 (i) intervene in any civil action
19 brought by the attorney general of a State
20 under paragraph (1); and

21 (ii) upon intervening—

22 (I) be heard on all matters aris-
23 ing in the civil action; and

24 (II) file petitions for appeal of a
25 decision in the civil action.

1 (4) INVESTIGATORY POWERS.—Nothing in this
2 subsection may be construed to prevent the attorney
3 general of a State from exercising the powers con-
4 ferred on the attorney general by the laws of the
5 State to—

6 (A) conduct investigations;

7 (B) administer oaths or affirmations; or

8 (C) compel the attendance of witnesses or
9 the production of documentary or other evi-
10 dence.

11 (5) PREEMPTIVE ACTION BY FEDERAL TRADE
12 COMMISSION.—If the Commission institutes a civil
13 action or an administrative action with respect to a
14 violation of section 3, the attorney general of a State
15 may not, during the pendency of the action, bring a
16 civil action under paragraph (1) against any defend-
17 ant named in the complaint of the Commission
18 based on the same set of facts giving rise to the al-
19 leged violation with respect to which the Commission
20 instituted the action.

21 (6) VENUE; SERVICE OF PROCESS.—

22 (A) VENUE.—Any action brought under
23 paragraph (1) may be brought in—

24 (i) the district court of the United
25 States that meets applicable requirements

1 relating to venue under section 1391 of
2 title 28, United States Code; or

3 (ii) another court of competent juris-
4 diction.

5 (B) SERVICE OF PROCESS.—In an action
6 brought under paragraph (1), process may be
7 served in any district in which the defendant—

8 (i) is an inhabitant; or

9 (ii) may be found.

10 (7) ACTIONS BY OTHER STATE OFFICIALS.—

11 (A) IN GENERAL.—In addition to civil ac-
12 tions brought by attorneys general under para-
13 graph (1), any other consumer protection offi-
14 cer of a State who is authorized by the State
15 to do so may bring a civil action under para-
16 graph (1), subject to the same requirements
17 and limitations that apply under this subsection
18 to civil actions brought by attorneys general.

19 (B) SAVINGS PROVISION.—Nothing in this
20 subsection may be construed to prohibit an au-
21 thorized official of a State from initiating or
22 continuing any proceeding in a court of the
23 State for a violation of any civil or criminal law
24 of the State.

1 **SEC. 5. NONENFORCEABILITY OF CERTAIN PROVISIONS**

2 **WAIVING RIGHTS AND REMEDIES.**

3 The rights and remedies provided under this Act may
4 not be waived or limited by contract or otherwise.

5 **SEC. 6. RELATION TO OTHER PRIVACY AND SECURITY**

6 **LAWS.**

7 Nothing in this Act may be construed to—

8 (1) modify, limit, or supersede the operation of
9 any privacy or security provision in any other Fed-
10 eral or State statute or regulation; or

11 (2) limit the authority of the Commission under
12 any other provision of law.

13 **SEC. 7. EFFECTIVE DATE.**

14 (a) **IN GENERAL.**—This Act shall take effect on the
15 date of enactment of this Act.

16 (b) **APPLICABILITY.**—Section 3 shall apply with re-
17 spect to an online service provider on and after the date
18 that is 180 days after the date of enactment of this Act.