

117TH CONGRESS
1ST 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. CORTEZ MASTO, Mr. SANDERS, Mr. MERKLEY, Ms. HASSAN, Ms. BALDWIN, Mr. BOOKER, Mr. MURPHY, Mr. DURBIN, Ms. KLOBUCHAR, Mr. BENNET, Ms. DUCKWORTH, Mrs. MURRAY, Mr. MARKEY, Mr. VAN HOLLEN, Mr. HEINRICH, Ms. SMITH, and Mr. MANCHIN) 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 2021”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

1 (1) COMMISSION.—The term “Commission”
2 means the Federal Trade Commission.

3 (2) END USER.—The term “end user” means
4 an individual who engages with an online service
5 provider or logs into or uses services provided by the
6 online service provider over the internet or any other
7 digital network.

8 (3) INDIVIDUAL IDENTIFYING DATA.—The term
9 “individual identifying data” means any data that
10 is—

11 (A) collected over the internet or any other
12 digital network; and

13 (B) linked, or reasonably linkable, to—
14 (i) a specific end user; or
15 (ii) a computing device that is associ-
16 ated with or routinely used by an end user.

17 (4) ONLINE SERVICE PROVIDER.—The term
18 “online service provider” means an entity that—

19 (A) is engaged in interstate commerce over
20 the internet or any other digital network; and
21 (B) in the course of business, collects indi-
22 vidual identifying data about end users, includ-
23 ing in a manner that is incidental to the busi-
24 ness conducted.

- 1 (5) SENSITIVE DATA.—The term “sensitive
2 data” means any data that includes—
3 (A) a social security number;
4 (B) personal information (as defined in
5 section 1302 of the Children’s Online Privacy
6 Protection Act of 1998 (15 U.S.C. 6501)) col-
7 lected from a child (as defined in such section
8 1302);
9 (C) a driver’s license number, passport
10 number, military identification number, or any
11 other similar number issued on a government
12 document used to verify identity;
13 (D) a financial account number, credit or
14 debit card number, or any required security
15 code, access code, or password that is necessary
16 to permit access to a financial account of an in-
17 dividual;
18 (E) unique biometric data such as a finger
19 print, voice print, a retina or iris image, or any
20 other unique physical representation;
21 (F) information sufficient to access an ac-
22 count of an individual, such as user name and
23 password or email address and password;

(G) the first and last name of an individual, or first initial and last name, or other unique identifier in combination with—

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

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

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

(H) information that relates to—

(i) the past, present, or future physical or mental health or condition of an individual; or

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

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

18 SEC. 3. PROVIDER DUTIES.

19 (a) IN GENERAL.—An online service provider shall
20 fulfill the duties of care, loyalty, and confidentiality under
21 paragraphs (1), (2), and (3), respectively, of subsection
22 (b).

23 (b) DUTIES.—

24 (1) DUTY OF CARE.—An online service provider
25 shall—

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

7 (2) DUTY OF LOYALTY.—An online service pro-
8 vider may not use individual identifying data, or
9 data derived from individual identifying data, in any
10 way that—

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

13 (B)(i) will result in reasonably foreseeable
14 and material physical or financial harm to an
15 end user; or

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

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

1 (B) may not disclose or sell individual
2 identifying data to, or share individual identi-
3 fying data with, any other person unless that
4 person enters into a contract with the online
5 service provider that imposes on the person the
6 same duties of care, loyalty, and confidentiality
7 toward the applicable end user as are imposed
8 on the online service provider under this sub-
9 section; and

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

20 (c) APPLICATION OF DUTIES TO THIRD PARTIES.—
21 If an online service provider transfers or otherwise pro-
22 vides access to individual identifying data to another per-
23 son, the requirements of paragraphs (1), (2), and (3) of
24 subsection (b) shall apply to such person with respect to

1 such data in the same manner that such requirements
2 apply to the online service provider.

3 (d) EXPANSION OF DUTY TO INFORM REGARDING
4 BREACHES.—The Commission may promulgate regula-
5 tions under section 553 of title 5, United States Code,
6 to apply the breach notification requirement under sub-
7 section (b)(1)(B) with respect to specific categories of in-
8 dividual identifying data other than sensitive data, as the
9 Commission determines necessary.

10 (e) EXCEPTIONS.—

11 (1) REGULATIONS.—The Commission may pro-
12 mulgate regulations under section 553 of title 5,
13 United States Code, to exempt categories of online
14 service providers or persons described in subsection
15 (c) from the requirement under subsection (a) or
16 subsection (c) (as applicable).

17 (2) CONSIDERATIONS.—In promulgating regu-
18 lations under paragraph (1), the Commission shall
19 consider, among other factors—

20 (A) the privacy risks posed by the use of
21 individual identifying data by an online service
22 provider or person described in subsection (c)
23 based on—

24 (i) the size of the provider or person;

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

(iii) the nature and scope of the activities of the provider or person; and

(iv) the sensitivity of the consumer information handled by the provider or person; and

(B) the costs and benefits of applying the requirement under subsection (a) or subsection (c) (as applicable) to online service providers or persons with particular combinations of characteristics considered under subparagraph (A) of this paragraph.

14 SEC. 4. ENFORCEMENT.

15 (a) ENFORCEMENT BY COMMISSION.—

23 (2) POWERS OF COMMISSION.—

1 this Act in the same manner, by the same
2 means, and with the same jurisdiction, powers,
3 and duties as though all applicable terms and
4 provisions of the Federal Trade Commission
5 Act (15 U.S.C. 41 et seq.) were incorporated
6 into and made a part of this Act.

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

13 (C) NONPROFIT ORGANIZATIONS AND COM-
14 MON CARRIERS.—Notwithstanding section 4 or
15 5(a)(2) of the Federal Trade Commission Act
16 (15 U.S.C. 44, 45(a)(2)) or any jurisdictional
17 limitation of the Commission, the Commission
18 shall also enforce this Act, in the same manner
19 provided in subparagraphs (A) and (B) of this
20 paragraph, with respect to—

21 (i) organizations not organized to
22 carry on business for their own profit or
23 that of their members; and

8 (b) ENFORCEMENT BY STATES.—

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

1 in addition to any other penalty otherwise applicable
2 to a violation of section 3, be liable for a civil pen-
3 alty equal to the amount calculated by multiplying—

4 (A) the greater of—

5 (i) the number of days during which
6 the online service provider or person was
7 not in compliance with that section; or

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

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

18 (A) NOTICE TO FEDERAL TRADE COMMIS-
19 SION —

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

(ii) upon intervening—

18 (I) be heard on all matters arising
19 in the civil action; and

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

(4) INVESTIGATORY POWERS.—Nothing in this subsection may be construed to prevent the attorney general of a State from exercising the powers con-

1 ferred on the attorney general by the laws of the
2 State to—

3 (A) conduct investigations;
4 (B) administer oaths or affirmations; or
5 (C) compel the attendance of witnesses or
6 the production of documentary or other evi-
7 dence.

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

18 (6) VENUE; SERVICE OF PROCESS.—

19 (A) VENUE.—Any action brought under
20 paragraph (1) may be brought in—

21 (i) the district court of the United
22 States that meets applicable requirements
23 relating to venue under section 1391 of
24 title 28, United States Code; or

(ii) another court of competent jurisdiction.

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

6 (i) is an inhabitant; or
7 (ii) may be found.

8 (7) ACTIONS BY OTHER STATE OFFICIALS.—

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 or person described in
18 section 3(c) on and after the date that is 180 days after
19 the date of enactment of this Act.