

112TH CONGRESS
2^D SESSION

H. R. 6377

To require disclosures to consumers regarding the capability of software to monitor mobile device usage, to require the express consent of the consumer prior to monitoring, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 12, 2012

Mr. MARKEY (for himself and Ms. DEGETTE) introduced the following bill;
which was referred to the Committee on Energy and Commerce

A BILL

To require disclosures to consumers regarding the capability of software to monitor mobile device usage, to require the express consent of the consumer prior to monitoring, and for other purposes.

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 “Mobile Device Privacy
5 Act”.

1 **SEC. 2. DISCLOSURES TO CONSUMERS REGARDING MOBILE**
2 **DEVICE MONITORING SOFTWARE.**

3 (a) IN GENERAL.—Not later than 1 year after the
4 date of the enactment of this Act, the Federal Trade Com-
5 mission shall promulgate regulations under section 553 of
6 title 5, United States Code, that require—

7 (1) a person who is in the business of selling
8 mobile devices directly to consumers (including a
9 provider of commercial mobile service or commercial
10 mobile data service who sells mobile devices in con-
11 nection with contracts to provide service) to disclose
12 the information described in subsection (b) to the
13 consumer at the time of sale of a mobile device on
14 which monitoring software is installed;

15 (2) a provider of commercial mobile service or
16 commercial mobile data service to disclose the infor-
17 mation described in subsection (b) to the consumer
18 at the time of entry into a contract to provide serv-
19 ice to the consumer on a mobile device—

20 (A) on which the provider installs moni-
21 toring software in connection with such con-
22 tract; and

23 (B) that the consumer does not purchase
24 from the provider in connection with such con-
25 tract;

1 (3) a manufacturer of a mobile device or of the
2 operating system software for a mobile device who
3 installs monitoring software on such device, after
4 such device is sold to the consumer, to disclose to
5 the consumer at the time of installing such software
6 the information described in subsection (b);

7 (4) a provider of commercial mobile service or
8 commercial mobile data service who installs moni-
9 toring software on a mobile device, after entry into
10 a contract to provide service to the consumer on
11 such device, to disclose to the consumer at the time
12 of installing such software the information described
13 in subsection (b); and

14 (5) a person who operates a website or other
15 online service from which a consumer downloads
16 monitoring software for installation on a mobile de-
17 vice to disclose the information described in sub-
18 section (b) to the consumer at the time of the
19 download.

20 (b) INFORMATION DESCRIBED.—The information de-
21 scribed in this subsection is the following:

22 (1) The fact that the monitoring software is in-
23 stalled on the mobile device (or, in the case of a dis-
24 closure described in subsection (a)(5), the fact that

1 the software that the consumer downloads is moni-
2 toring software).

3 (2) The types of information that the moni-
4 toring software is capable of collecting and transmit-
5 ting.

6 (3) The identity of any person to whom any in-
7 formation collected will be transmitted and of any
8 other person with whom such information will be
9 shared.

10 (4) How such information will be used.

11 (5) Procedures by which a consumer who has
12 consented to collection and transmission of informa-
13 tion by the monitoring software may exercise the op-
14 portunity to prohibit further collection and trans-
15 mission, as described in section 3(2).

16 (6) Such additional information about the mon-
17 itoring software as the Federal Trade Commission
18 considers appropriate.

19 (c) MANNER OF DISCLOSURE.—The regulations pro-
20 mulgated under subsection (a) shall require the following:

21 (1) The disclosures shall be made in a clear and
22 conspicuous manner, to be determined by the Fed-
23 eral Trade Commission.

24 (2) The disclosures shall be displayed in a clear
25 and conspicuous manner on the website of a person

1 required to make such disclosures, except that if
2 such person does not maintain a website, such per-
3 son shall file such disclosures with the appropriate
4 Commission.

5 (d) EXEMPTIONS PERMITTED.—If the Federal Trade
6 Commission determines that the use of monitoring soft-
7 ware for a particular purpose is consistent with the rea-
8 sonable expectations of consumers, the Federal Trade
9 Commission may include in the regulations promulgated
10 under subsection (a) an exemption from the disclosures
11 required by such regulations with respect to monitoring
12 software that is used only for such purpose (or for another
13 purpose with respect to which the Federal Trade Commis-
14 sion has made a determination under this subsection).

15 **SEC. 3. CONSUMER CONSENT TO MONITORING OF MOBILE**
16 **DEVICE USAGE.**

17 Not later than 1 year after the date of the enactment
18 of this Act, the Federal Trade Commission shall promul-
19 gate regulations under section 553 of title 5, United
20 States Code, that require any person who is subject to the
21 disclosure requirements of the regulations promulgated
22 under section 2(a) to—

23 (1) obtain the express consent of the consumer
24 prior to the time when the monitoring software first
25 begins collecting and transmitting information; and

1 (2) provide a consumer who has consented to
2 collection and transmission of information by the
3 monitoring software with the opportunity at any
4 time to prohibit further collection and transmission
5 of information by such software.

6 **SEC. 4. INFORMATION SECURITY REQUIREMENTS.**

7 (a) IN GENERAL.—Not later than 1 year after the
8 date of the enactment of this Act, the Federal Trade Com-
9 mission shall promulgate regulations under section 553 of
10 title 5, United States Code, that require any person who
11 receives, directly or indirectly, information that is trans-
12 mitted from monitoring software with respect to which dis-
13 closures are required by the regulations promulgated
14 under section 2(a) to establish and implement policies and
15 procedures regarding information security practices for
16 the treatment and protection of such information, taking
17 into consideration—

18 (1) the size of, and the nature, scope, and com-
19 plexity of the activities engaged in by, such person;

20 (2) the current state of the art in administra-
21 tive, technical, and physical safeguards for pro-
22 tecting such information; and

23 (3) the cost of implementing such safeguards.

24 (b) REQUIREMENTS.—Such regulations shall require
25 the policies and procedures to include the following:

1 (1) A security policy with respect to the collec-
2 tion, use, sale, other dissemination, and maintenance
3 of such information.

4 (2) The identification of an officer or other in-
5 dividual as the point of contact with responsibility
6 for the management of the security of such informa-
7 tion.

8 (3) A process for identifying and assessing any
9 reasonably foreseeable vulnerabilities in any system
10 maintained by such person that contains such infor-
11 mation, which shall include regular monitoring for a
12 breach of security of such system.

13 (4) A process for taking preventive and correc-
14 tive action to mitigate against any vulnerabilities
15 identified in the process required by paragraph (3),
16 which may include implementing any changes to se-
17 curity practices and the architecture, installation, or
18 implementation of network or operating software.

19 (5) A process for disposing of such information
20 by shredding, permanently erasing, or otherwise
21 modifying such information to make such informa-
22 tion permanently unreadable or undecipherable.

23 (6) A standard method or methods for the de-
24 struction of paper documents and other non-elec-
25 tronic data containing such information.

1 (c) DISCLOSURE OF POLICIES AND PROCEDURES.—
2 Such regulations shall require the policies and procedures
3 to be displayed in a clear and conspicuous manner on the
4 website of a person required to establish and implement
5 such policies and procedures, except that if such person
6 does not maintain a website, such person shall file such
7 policies and procedures with the appropriate Commission.

8 (d) TREATMENT OF ENTITIES GOVERNED BY OTHER
9 LAW.—A person shall be deemed to be in compliance with
10 the regulations promulgated under subsection (a) if such
11 person is in compliance with any other Federal law that
12 requires such person to maintain policies and procedures
13 with respect to information security that, taken as a whole
14 and as the Federal Trade Commission shall determine in
15 the rulemaking required by such subsection, provide pro-
16 tections substantially similar to, or greater than, those
17 provided by the policies and procedures required by the
18 regulations promulgated under such subsection.

19 **SEC. 5. FILING OF CERTAIN AGREEMENTS REGARDING IN-**
20 **FORMATION RECEIPT.**

21 (a) IN GENERAL.—Not later than 1 year after the
22 date of the enactment of this Act, the Federal Trade Com-
23 mission shall promulgate regulations under section 553 of
24 title 5, United States Code, that require a copy of an

1 agreement described in subsection (b) to be filed with the
2 appropriate Commission.

3 (b) AGREEMENT DESCRIBED.—An agreement de-
4 scribed in this subsection—

5 (1) is an agreement under which a person re-
6 ceives, directly or indirectly, information that is
7 transmitted from monitoring software with respect
8 to which disclosures are required by the regulations
9 promulgated under section 2(a); and

10 (2) does not include an agreement between such
11 a person and the consumer on whose mobile device
12 such monitoring software is installed.

13 **SEC. 6. ENFORCEMENT.**

14 (a) BY FEDERAL TRADE COMMISSION.—

15 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
16 TICES.—A violation of a regulation promulgated
17 under section 2, 3, 4, or 5 shall be treated as a vio-
18 lation of a regulation under section 18(a)(1)(B) of
19 the Federal Trade Commission Act (15 U.S.C.
20 57a(a)(1)(B)) regarding unfair or deceptive acts or
21 practices.

22 (2) POWERS OF FEDERAL TRADE COMMIS-
23 SION.—The Federal Trade Commission shall enforce
24 the regulations promulgated under sections 2, 3, 4,
25 and 5 in the same manner, by the same means, and

1 with the same jurisdiction, powers, and duties as
2 though all applicable terms and provisions of the
3 Federal Trade Commission Act (15 U.S.C. 41 et
4 seq.) were incorporated into and made a part of this
5 Act, and any person who violates such regulations
6 shall be subject to the penalties and entitled to the
7 privileges and immunities provided in the Federal
8 Trade Commission Act.

9 (b) BY FEDERAL COMMUNICATIONS COMMISSION.—

10 (1) TREATMENT AS VIOLATION OF COMMUNICA-
11 TIONS ACT OF 1934.—A violation of a regulation pro-
12 mulgated under section 2, 3, 4, or 5 by a provider
13 of commercial mobile service or commercial mobile
14 data service or a manufacturer of a mobile device
15 shall be treated as a violation of the Communica-
16 tions Act of 1934 (47 U.S.C. 151 et seq.).

17 (2) POWERS OF FEDERAL COMMUNICATIONS
18 COMMISSION.—The Federal Communications Com-
19 mission shall enforce the regulations promulgated
20 under sections 2, 3, 4, and 5 with respect to pro-
21 viders of commercial mobile service or commercial
22 mobile data service and manufacturers of mobile de-
23 vices in the same manner, by the same means, and
24 with the same jurisdiction, powers, and duties as
25 though all applicable terms and provisions of the

1 Communications Act of 1934 were incorporated into
2 and made a part of this Act, and any such provider
3 or manufacturer who violates such regulations shall
4 be subject to the penalties and entitled to the privi-
5 leges and immunities provided in the Communica-
6 tions Act of 1934.

7 (c) DIVISION OF RESPONSIBILITIES BETWEEN FTC
8 AND FCC.—

9 (1) REGULATIONS.—In promulgating the regu-
10 lations required by sections 2, 3, 4, and 5, the Fed-
11 eral Trade Commission shall consult with the Fed-
12 eral Communications Commission.

13 (2) ENFORCEMENT.—In enforcing such regula-
14 tions, the Federal Trade Commission and the Fed-
15 eral Communications Commission shall consult with
16 each other.

17 (3) FCC REGULATIONS ON FILINGS.—The Fed-
18 eral Communications Commission, in consultation
19 with the Federal Trade Commission, may promul-
20 gate regulations with respect to the form and man-
21 ner of any filing that is required to be made with
22 the Federal Communications Commission by a regu-
23 lation required by section 2, 4, or 5.

24 (d) ACTIONS BY STATES.—

1 (1) CIVIL ACTIONS.—In any case in which the
2 attorney general of a State, or an official or agency
3 of a State, has reason to believe that an interest of
4 the residents of that State has been or is threatened
5 or adversely affected by an act or practice that vio-
6 lates any regulation promulgated under section 2, 3,
7 4, or 5, the State, as *parens patriae*, may bring a
8 civil action on behalf of the residents of the State in
9 an appropriate State court or an appropriate district
10 court of the United States to—

11 (A) enjoin that act or practice;

12 (B) enforce compliance with the regulation;

13 (C) obtain damages, restitution, or other
14 compensation on behalf of residents of the
15 State; or

16 (D) obtain such other legal and equitable
17 relief as the court may consider to be appro-
18 priate.

19 (2) NOTICE.—Before filing an action under this
20 subsection, the attorney general, official, or agency
21 of the State involved shall provide to the appropriate
22 Commission a written notice of that action and a
23 copy of the complaint for that action. If the attorney
24 general, official, or agency determines that it is not
25 feasible to provide the notice described in this para-

1 graph before the filing of the action, the attorney
2 general, official, or agency shall provide written no-
3 tice of the action and a copy of the complaint to the
4 appropriate Commission immediately upon the filing
5 of the action.

6 (3) AUTHORITY OF APPROPRIATE COMMIS-
7 SION.—

8 (A) IN GENERAL.—On receiving notice
9 under paragraph (2) of an action under this
10 subsection, the appropriate Commission shall
11 have the right—

12 (i) to intervene in the action;

13 (ii) upon so intervening, to be heard
14 on all matters arising therein; and

15 (iii) to file petitions for appeal.

16 (B) LIMITATION ON STATE ACTION WHILE
17 FEDERAL ACTION IS PENDING.—If the Federal
18 Trade Commission, the Federal Communica-
19 tions Commission, or the Attorney General of
20 the United States has instituted a civil action
21 for violation of a regulation promulgated under
22 section 2, 3, 4, or 5 (referred to in this sub-
23 paragraph as the “Federal action”), no State
24 attorney general, official, or agency may bring
25 an action under this subsection during the

1 pendency of the Federal action against any de-
2 fendant named in the complaint in the Federal
3 action for any violation as alleged in that com-
4 plaint.

5 (4) RULE OF CONSTRUCTION.—For purposes of
6 bringing a civil action under this subsection, nothing
7 in this Act shall be construed to prevent an attorney
8 general, official, or agency of a State from exercising
9 the powers conferred on the attorney general, offi-
10 cial, or agency by the laws of that State to conduct
11 investigations, administer oaths and affirmations, or
12 compel the attendance of witnesses or the production
13 of documentary and other evidence.

14 (e) PRIVATE RIGHT OF ACTION.—

15 (1) IN GENERAL.—A person injured by an act
16 in violation of a regulation promulgated under sec-
17 tion 2, 3, 4, or 5 may bring in an appropriate State
18 court or an appropriate district court of the United
19 States—

20 (A) an action to enjoin such violation;

21 (B) an action to recover damages for ac-
22 tual monetary loss from such violation, or to re-
23 ceive up to \$1,000 in damages for each such
24 violation, whichever is greater; or

25 (C) both such actions.

1 (2) WILLFUL OR KNOWING VIOLATIONS.—If the
2 court finds that the defendant acted willfully or
3 knowingly in committing a violation described in
4 paragraph (1), the court may, in its discretion, in-
5 crease the amount of the award to an amount equal
6 to not more than 3 times the amount available
7 under paragraph (1)(B).

8 (3) COSTS.—The court shall award to a pre-
9 vailing plaintiff in an action under this subsection
10 the costs of such action and reasonable attorney’s
11 fees, as determined by the court.

12 (4) LIMITATION.—An action may be com-
13 menced under this subsection not later than 2 years
14 after the date on which the person first discovered
15 or had a reasonable opportunity to discover the vio-
16 lation.

17 (5) NONEXCLUSIVE REMEDY.—The remedy pro-
18 vided by this subsection shall be in addition to any
19 other remedies available to the person, except that,
20 in the case of a violation or series of related viola-
21 tions by a common carrier subject to title II of the
22 Communications Act of 1934 (47 U.S.C. 201 et
23 seq.), the person may pursue either the remedy pro-
24 vided by this subsection or any remedies provided by
25 such title, but not both.

1 **SEC. 7. DEFINITIONS.**

2 In this Act:

3 (1) **APPROPRIATE COMMISSION.**—The term
4 “appropriate Commission” means either the Federal
5 Trade Commission or the Federal Communications
6 Commission, or both, depending on which Commis-
7 sion has jurisdiction under section 6 with respect to
8 the person and activity involved.

9 (2) **COMMERCIAL MOBILE DATA SERVICE.**—The
10 term “commercial mobile data service” has the
11 meaning given such term in section 6001 of the Mid-
12 dle Class Tax Relief and Job Creation Act of 2012
13 (47 U.S.C. 1401).

14 (3) **COMMERCIAL MOBILE SERVICE.**—The term
15 “commercial mobile service” has the meaning given
16 such term in section 332 of the Communications Act
17 of 1934 (47 U.S.C. 332).

18 (4) **MOBILE DEVICE.**—The term “mobile de-
19 vice” means a personal electronic device that has the
20 capability of transmitting and receiving voice, video,
21 or data communications by means of commercial
22 mobile service or commercial mobile data service.

23 (5) **MONITORING SOFTWARE.**—The term “mon-
24 itoring software” means software that has the capa-
25 bility to monitor the usage of a mobile device or the
26 location of the user and to transmit the information

1 collected to another device or system, whether or not
2 such capability is the primary function of the soft-
3 ware or the purpose for which the software is mar-
4 keted.

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