

115TH CONGRESS
2D SESSION

S. 2639

To require the Federal Trade Commission to establish privacy protections for customers of online edge providers, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 10, 2018

Mr. MARKEY (for himself and Mr. BLUMENTHAL) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To require the Federal Trade Commission to establish privacy protections for customers of online edge providers, 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 “Customer Online Noti-
5 fication for Stopping Edge-provider Network Trans-
6 gressions” or the “CONSENT Act”.

7 **SEC. 2. PRIVACY OF CUSTOMERS OF EDGE PROVIDERS.**

8 (a) DEFINITIONS.—In this section—

1 (1) the term “breach of security” means any in-
2 stance in which a person, without authorization or in
3 violation of any authorization provided to the person,
4 gains access to, uses, or discloses sensitive customer
5 proprietary information;

6 (2) the term “Commission” means the Federal
7 Trade Commission;

8 (3) the term “customer” means—

9 (A) an individual who is a customer of an
10 edge provider; and

11 (B) an individual who is a user of an edge
12 service provided by an edge provider;

13 (4) the term “edge provider” means a person
14 that provides an edge service, but only to the extent
15 to which the person provides that service;

16 (5) the term “edge service”—

17 (A) means a service that is provided over
18 the Internet—

19 (i) for which the edge provider re-
20 quires the customer to subscribe or estab-
21 lish an account in order to use the service;

22 (ii) that the customer purchases from
23 the edge provider without a subscription or
24 account;

1 (iii) through which a program
2 searches for and identifies items in a data-
3 base that correspond to keywords or char-
4 acters specified by the customer; or

5 (iv) through which a customer di-
6 vulges sensitive customer proprietary infor-
7 mation of the customer; and

8 (B) includes any service that is provided—

9 (i) through a software program, in-
10 cluding a mobile application; or

11 (ii) over the Internet, directly or indi-
12 rectly, through a connected device;

13 (6) the term “opt-in consent” means a method
14 by which an edge provider may obtain from a cus-
15 tomer affirmative, express consent to use, disclose,
16 or permit access to the sensitive customer propri-
17 etary information of the customer after the customer
18 has received explicit notification of the request of the
19 edge provider with respect to that information;

20 (7) the term “personally identifiable informa-
21 tion” means any information that is linked, or rea-
22 sonably may be linked, to a specific individual or de-
23 vice; and

24 (8) the term “sensitive customer proprietary in-
25 formation” includes—

- 1 (A) financial information;
- 2 (B) health information;
- 3 (C) information pertaining to children;
- 4 (D) Social Security numbers;
- 5 (E) precise geolocation information;
- 6 (F) content of communications;
- 7 (G) call detail information;
- 8 (H) web browsing history, application
9 usage history, and the functional equivalents of
10 either; and
- 11 (I) any other personally identifiable infor-
12 mation that the Commission determines to be
13 sensitive.

14 (b) PRIVACY OF CUSTOMERS OF EDGE PRO-
15 VIDERS.—

16 (1) ACT PROHIBITED.—It is unlawful for an
17 edge provider to violate the privacy of a customer in
18 a manner that violates a regulation prescribed under
19 paragraph (2).

20 (2) REGULATIONS.—

21 (A) IN GENERAL.—In carrying out this
22 Act, the Commission shall—

23 (i) not later than 1 year after the date
24 of enactment of this Act, promulgate,
25 under section 553 of title 5, United States

1 Code, regulations to protect the privacy of
2 customers of edge providers; and

3 (ii) ensure that the regulations pro-
4 mulgated under clause (i) take effect not
5 later than 180 days after the date on
6 which the regulations are promulgated.

7 (B) REQUIREMENTS UNDER REGULA-
8 TIONS.—In promulgating regulations under
9 subparagraph (A), the Commission shall—

10 (i) require an edge provider to notify
11 a customer about the collection, use, and
12 sharing of the sensitive customer propri-
13 etary information of the customer, includ-
14 ing by—

15 (I) notifying the customer about
16 the types of sensitive customer propri-
17 etary information the edge provider
18 collects;

19 (II) specifying how and for what
20 purposes the edge provider uses and
21 shares sensitive customer proprietary
22 information; and

23 (III) identifying the types of enti-
24 ties with which the edge provider

1 shares sensitive customer proprietary
2 information;

3 (ii) require an edge provider to—

4 (I) supply the information de-
5 scribed in clause (i) when a customer
6 initially subscribes to, establishes an
7 account for, purchases, or begins re-
8 ceiving an edge service; and

9 (II) update a customer when the
10 policies of the edge provider relating
11 to the information described in clause
12 (i) change in a significant way;

13 (iii) require an edge provider to obtain
14 opt-in consent from a customer to use,
15 share, or sell the sensitive customer propri-
16 etary information of the customer;

17 (iv) implement strong protection for
18 sensitive customer proprietary information
19 that has been de-identified to prevent the
20 restoration of any personally identifiable
21 information that has been previously re-
22 moved, including by—

23 (I) requiring an edge provider to
24 alter the customer information so that
25 the customer information cannot be

1 reasonably linked to a specific indi-
2 vidual or device;

3 (II) requiring an edge provider to
4 publically commit to maintain and use
5 sensitive customer proprietary infor-
6 mation in an unidentifiable format
7 and to not attempt to restore any per-
8 sonally identifiable information that
9 has been previously removed from the
10 sensitive customer proprietary infor-
11 mation; and

12 (III) requiring an edge provider
13 to contractually prohibit the practice
14 of restoring any personally identifiable
15 information that has been previously
16 removed from sensitive customer pro-
17 prietary information;

18 (v) determine on a case-by-case basis
19 the reasonableness of any program that re-
20 lates the price of an edge service to the
21 privacy protections afforded to customers,
22 and require an edge provider to fully dis-
23 close plans that provide discounts or other
24 incentives in exchange for a express affirm-
25 ative consent of the customer to the use

1 and sharing of the sensitive customer pro-
2 prietary information of the customer;

3 (vi) prohibit an edge provider from re-
4 fusing to serve a customer who does not
5 consent to the use and sharing of the cus-
6 tomer proprietary information of the cus-
7 tomer for commercial purposes (commonly
8 known as a “take-it-or-leave-it offer”) on
9 the basis of that refusal to consent by the
10 customer; and

11 (vii) require an edge provider to—

12 (I) develop reasonable data secu-
13 rity practices; and

14 (II) notify a customer if a breach
15 of security has occurred if the edge
16 provider determines that an unauthor-
17 ized disclosure of the sensitive cus-
18 tomer proprietary information of the
19 customer has occurred and harm is
20 reasonably likely to occur.

21 (c) ENFORCEMENT BY THE COMMISSION.—

22 (1) IN GENERAL.—Except as otherwise pro-
23 vided, this Act and the regulations prescribed under
24 this Act shall be enforced by the Commission under

1 the Federal Trade Commission Act (15 U.S.C. 41 et
2 seq.).

3 (2) UNFAIR OR DECEPTIVE ACTS OR PRAC-
4 TICES.—Subject to subsection (d), a violation of this
5 Act or a regulation prescribed under this Act shall
6 be treated as a violation of a rule defining an unfair
7 or deceptive act or practice prescribed under section
8 18(a)(1)(B) of the Federal Trade Commission Act
9 (15 U.S.C. 57a(a)(1)(B)).

10 (3) ACTIONS BY THE COMMISSION.—Subject to
11 subsection (d), and except as provided in subsection
12 (f)(1), the Commission shall prevent any person
13 from violating this Act or a regulation prescribed
14 under this Act in the same manner, by the same
15 means, and with the same jurisdiction, powers, and
16 duties as though all applicable terms and provisions
17 of the Federal Trade Commission Act (15 U.S.C. 41
18 et seq.) were incorporated into and made a part of
19 this Act, and any person who violates this Act or
20 such regulation shall be subject to the penalties and
21 entitled to the privileges and immunities provided in
22 the Federal Trade Commission Act (15 U.S.C. 41 et
23 seq.).

1 (d) ENFORCEMENT BY CERTAIN OTHER AGEN-
2 CIES.—Compliance with the requirements imposed under
3 this Act shall be enforced as follows:

4 (1) Under section 8 of the Federal Deposit In-
5 surance Act (12 U.S.C. 1818) by the appropriate
6 Federal banking agency, with respect to an insured
7 depository institution (as those terms are defined in
8 section 3 of that Act (12 U.S.C. 1813)).

9 (2) Under the Federal Credit Union Act (12
10 U.S.C. 1751 et seq.) by the National Credit Union
11 Administration Board, with respect to any Federal
12 credit union.

13 (3) Under part A of subtitle VII of title 49,
14 United States Code, by the Secretary of Transpor-
15 tation, with respect to any air carrier or foreign air
16 carrier subject to that part.

17 (4) Under the Packers and Stockyards Act,
18 1921 (7 U.S.C. 181 et seq.) (except as provided in
19 section 406 of that Act (7 U.S.C. 226; 227)) by the
20 Secretary of Agriculture, with respect to any activi-
21 ties subject to that Act.

22 (5) Under the Farm Credit Act of 1971 (12
23 U.S.C. 2001 et seq.) by the Farm Credit Adminis-
24 tration, with respect to any Federal land bank, Fed-

1 eral land bank association, Federal intermediate
2 credit bank, or production credit association.

3 (e) ENFORCEMENT BY STATE ATTORNEYS GEN-
4 ERAL.—

5 (1) IN GENERAL.—

6 (A) CIVIL ACTIONS.—In any case in which
7 the attorney general of a State has reason to
8 believe that an interest of the residents of that
9 State has been or is threatened or adversely af-
10 fected by the engagement of any person in a
11 practice that violates this Act or a regulation
12 prescribed under this Act, the State, as *parens*
13 *patriae*, may bring a civil action on behalf of
14 the residents of the State in a district court of
15 the United States of appropriate jurisdiction
16 to—

17 (i) enjoin that practice;

18 (ii) enforce compliance with this Act
19 or such regulation;

20 (iii) obtain damages, restitution, or
21 other compensation on behalf of residents
22 of the State; or

23 (iv) obtain such other relief as the
24 court may consider to be appropriate.

25 (B) NOTICE.—

1 (i) IN GENERAL.—Before filing an ac-
2 tion under subparagraph (A), the attorney
3 general of the State involved shall provide
4 to the Commission—

5 (I) written notice of that action;

6 and

7 (II) a copy of the complaint for
8 that action.

9 (ii) EXEMPTION.—

10 (I) IN GENERAL.—Clause (i)
11 shall not apply with respect to the fil-
12 ing of an action by an attorney gen-
13 eral of a State under this paragraph
14 if the attorney general determines
15 that it is not feasible to provide the
16 notice described in that clause before
17 the filing of the action.

18 (II) NOTIFICATION.—In an ac-
19 tion described in subclause (I), the at-
20 torney general of a State shall provide
21 notice and a copy of the complaint to
22 the Commission at the same time as
23 the attorney general files the action.

24 (2) INTERVENTION.—

1 (A) IN GENERAL.—On receiving notice
2 under paragraph (1)(B), the Commission shall
3 have the right to intervene in the action that is
4 the subject of the notice.

5 (B) EFFECT OF INTERVENTION.—If the
6 Commission intervenes in an action under para-
7 graph (1), it shall have the right—

8 (i) to be heard with respect to any
9 matter that arises in that action; and

10 (ii) to file a petition for appeal.

11 (3) CONSTRUCTION.—For purposes of bringing
12 any civil action under paragraph (1), nothing in this
13 Act shall be construed to prevent an attorney gen-
14 eral of a State from exercising the powers conferred
15 on the attorney general by the laws of that State
16 to—

17 (A) conduct investigations;

18 (B) administer oaths or affirmations; or

19 (C) compel the attendance of witnesses or
20 the production of documentary and other evi-
21 dence.

22 (4) ACTIONS BY THE COMMISSION.—In any
23 case in which an action is instituted by or on behalf
24 of the Commission for violation of this Act or a reg-
25 ulation prescribed under this Act, no State may,

1 during the pendency of that action, institute an ac-
2 tion under paragraph (1) against any defendant
3 named in the complaint in the action instituted by
4 or on behalf of the Commission for that violation.

5 (5) VENUE; SERVICE OF PROCESS.—

6 (A) VENUE.—Any action brought under
7 paragraph (1) may be brought in the district
8 court of the United States that meets applicable
9 requirements relating to venue under section
10 1391 of title 28, United States Code.

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

14 (i) is an inhabitant; or

15 (ii) may be found.

16 (f) TELECOMMUNICATIONS CARRIERS.—

17 (1) DEFINITION.—In this subsection, the term
18 “telecommunications carrier” has the meaning given
19 the term in section 3 of the Communications Act of
20 1934 (47 U.S.C. 153).

21 (2) ENFORCEMENT BY THE COMMISSION.—Not-
22 withstanding section 5(a)(2) of the Federal Trade
23 Commission Act (15 U.S.C. 45(a)(2)), compliance
24 with the requirements imposed under this Act shall
25 be enforced by the Commission with respect to any

1 telecommunications carrier, but only to the extent
2 that the telecommunications carrier is operating as
3 an edge provider.

4 (3) RELATIONSHIP TO OTHER LAW.—To the ex-
5 tent that the applicability of section 222, 338(i), or
6 631 of the Communications Act of 1934 (47 U.S.C.
7 222, 338(i), 551) to a telecommunications carrier is
8 inconsistent with this Act, this Act shall supersede
9 those sections only to the extent that the tele-
10 communications carrier is operating as an edge pro-
11 vider.

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