

115TH CONGRESS  
2D SESSION

# S. 3744

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

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## IN THE SENATE OF THE UNITED STATES

DECEMBER 12, 2018

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 Commerce, Science, and Transportation

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## 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—

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

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

8           (3) the term “individual identifying data”  
9 means any data that is—

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

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

13                 (i) a specific end user; or

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

16           (4) the term “online service provider” means an  
17 entity that—

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

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

24           (5) the term “sensitive data” means any data  
25 that includes—

1 (A) a social security number;

2 (B) personal information (as defined in  
3 section 1302 of the Children’s Online Privacy  
4 Protection Act of 1998 (15 U.S.C. 6501)) col-  
5 lected from a child (as defined in such section  
6 1302);

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

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

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

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

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

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

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

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

7 (H) information that relates to—

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

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

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

15 **SEC. 3. PROVIDER DUTIES.**

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

20 (b) DUTIES.—

21 (1) DUTY OF CARE.—An online service provider  
22 shall—

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

1 (B) subject to subsection (c), promptly in-  
2 form an end user of any breach of the duty de-  
3 scribed in subparagraph (A) of this paragraph  
4 with respect to sensitive data of that end user.

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

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

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

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

16 (3) DUTY OF CONFIDENTIALITY.—An online  
17 service provider—

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

23 (B) may not disclose or sell individual  
24 identifying data to, or share individual identi-  
25 fying data with, any other person unless that

1 person enters into a contract with the online  
2 service provider that imposes on the person the  
3 same duties of care, loyalty, and confidentiality  
4 toward the applicable end user as are imposed  
5 on the online service provider under this sub-  
6 section; and

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

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

24 (d) EXCEPTIONS.—

1           (1) REGULATIONS.—The Commission may pro-  
2           mulgate regulations under section 553 of title 5,  
3           United States Code, to exempt categories of online  
4           service providers from the requirement under sub-  
5           section (a).

6           (2) CONSIDERATIONS.—In promulgating regu-  
7           lations under paragraph (1), the Commission shall  
8           consider, among other factors—

9                   (A) the privacy risks posed by the use of  
10                  individual identifying data by an online service  
11                  provider based on—

12                           (i) the size of the provider;

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

15                           (iii) the nature and scope of the ac-  
16                          tivities of the provider; and

17                           (iv) the sensitivity of the consumer in-  
18                          formation handled by the provider; and

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

24 **SEC. 4. ENFORCEMENT.**

25           (a) ENFORCEMENT BY COMMISSION.—

1           (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-  
2           TICES.—A violation of section 3 by an online service  
3           provider shall be treated as a violation of a rule de-  
4           fining an unfair or deceptive act or practice pre-  
5           scribed under section 18(a)(1)(B) of the Federal  
6           Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

7           (2) POWERS OF COMMISSION.—

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

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

22          (C) NONPROFIT ORGANIZATIONS AND COM-  
23          MON CARRIERS.—Notwithstanding section 4 or  
24          5(a)(2) of the Federal Trade Commission Act  
25          (15 U.S.C. 44, 45(a)(2)) or any jurisdictional

1 limitation of the Commission, the Commission  
2 shall also enforce this Act, in the same manner  
3 provided in subparagraphs (A) and (B) of this  
4 paragraph, with respect to—

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

8 (ii) common carriers subject to the  
9 Communications Act of 1934 (47 U.S.C.  
10 151 et seq.).

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

15 (b) ENFORCEMENT BY STATES.—

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

1 obtain appropriate relief, including civil penalties in  
 2 the amount determined under paragraph (2).

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

10 (A) the greater of—

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

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

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

22 (3) RIGHTS OF FEDERAL TRADE COMMIS-  
 23 SION.—

24 (A) NOTICE TO FEDERAL TRADE COMMIS-  
 25 SION.—

1 (i) IN GENERAL.—Except as provided  
2 in clause (iii), the attorney general of a  
3 State shall notify the Commission in writ-  
4 ing that the attorney general intends to  
5 bring a civil action under paragraph (1)  
6 before initiating the civil action.

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

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

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

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

23 (ii) upon intervening—

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

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

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

8 (A) conduct investigations;

9 (B) administer oaths or affirmations; or

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

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

23 (6) VENUE; SERVICE OF PROCESS.—

24 (A) VENUE.—Any action brought under  
25 paragraph (1) may be brought in—

1 (i) the district court of the United  
2 States that meets applicable requirements  
3 relating to venue under section 1391 of  
4 title 28, United States Code; or

5 (ii) another court of competent juris-  
6 diction.

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

10 (i) is an inhabitant; or

11 (ii) may be found.

12 (7) ACTIONS BY OTHER STATE OFFICIALS.—

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

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

1 State for a violation of any civil or criminal law  
2 of the State.

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

4 **WAIVING RIGHTS AND REMEDIES.**

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

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

8 **LAWS.**

9 Nothing in this Act may be construed to—

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

13 (2) limit the authority of the Commission under  
14 any other provision of law.

15 **SEC. 7. EFFECTIVE DATE.**

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

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

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