

114TH CONGRESS
1ST SESSION

S. 2404

To require the Federal Trade Commission to prescribe regulations regarding the collection and use of personal information obtained by tracking the online activity of an individual, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 15, 2015

Mr. BLUMENTHAL (for himself and Mr. MARKEY) 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 prescribe regulations regarding the collection and use of personal information obtained by tracking the online activity of an individual, 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 “Do Not Track Online
5 Act of 2015”.

1 **SEC. 2. REGULATIONS RELATING TO “DO-NOT-TRACK”**
2 **MECHANISMS.**

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—

6 (1) regulations that establish standards for the
7 implementation of a mechanism by which an indi-
8 vidual can simply and easily indicate whether the in-
9 dividual prefers to have personal information col-
10 lected by providers of online services, including by
11 providers of mobile applications and services; and

12 (2) rules that prohibit, except as provided in
13 subsection (b), such providers from—

14 (A) collecting personal information on indi-
15 viduals who have expressed, via a mechanism
16 that meets the standards promulgated under
17 paragraph (1), a preference not to have such in-
18 formation collected; and

19 (B) discriminating against individuals de-
20 scribed in subparagraph (A).

21 (b) EXCEPTION.—The rules promulgated under para-
22 graph (2) of subsection (a) shall allow for the collection
23 and use of personal information on an individual described
24 in such paragraph, notwithstanding the expressed pref-
25 erence of the individual via a mechanism that meets the

1 standards promulgated under paragraph (1) of such sub-
2 section, to the extent—

3 (1) necessary to provide a service requested by
4 the individual, including with respect to such service,
5 basic functionality and effectiveness, so long as such
6 information is anonymized or deleted upon the provi-
7 sion of such service; or

8 (2) the individual—

9 (A) receives clear, conspicuous, and accu-
10 rate notice on the collection and use of such in-
11 formation; and

12 (B) affirmatively consents to such collec-
13 tion and use.

14 (c) FACTORS.—In promulgating standards and rules
15 under subsection (a), the Federal Trade Commission shall
16 consider and take into account the following:

17 (1) The appropriate scope of such standards
18 and rules, including the conduct to which such rules
19 shall apply and the persons required to comply with
20 such rules.

21 (2) The technical feasibility and costs of—

22 (A) implementing mechanisms that would
23 meet such standards; and

24 (B) complying with such rules.

25 (3) Mechanisms that—

1 (A) have been developed or used before the
2 date of the enactment of this Act; and

3 (B) are for individuals to indicate simply
4 and easily whether the individuals prefer to
5 have personal information collected by providers
6 of online services, including by providers of mo-
7 bile applications and services.

8 (4) The experience of individuals using the
9 mechanisms regarding the ease of use and practi-
10 cality of the mechanisms, including the universality,
11 persistence, and stability of preferences expressed
12 through the mechanisms.

13 (5) How mechanisms that meet such standards
14 should be publicized and offered to individuals.

15 (6) Whether and how information can be col-
16 lected and used on an anonymous basis so that the
17 information—

18 (A) cannot be reasonably linked or identi-
19 fied with a person or device, both on its own
20 and in combination with other information; and

21 (B) does not qualify as personal informa-
22 tion subject to the rules promulgated under
23 subsection (a)(2).

24 (7) The standards under which personal infor-
25 mation may be collected and used, subject to the

1 anonymization or deletion requirements of sub-
2 section (b)(1)—

3 (A) to fulfill the basic functionality and ef-
4 fectiveness of an online service, including a mo-
5 bile application or service;

6 (B) to provide the content or services re-
7 quested by individuals who have otherwise ex-
8 pressed, via a mechanism that meets the stand-
9 ards promulgated under subsection (a)(1), a
10 preference not to have personal information col-
11 lected; and

12 (C) for such other purposes as the Com-
13 mission determines substantially facilitates the
14 functionality and effectiveness of the online
15 service, or mobile application or service, in a
16 manner that does not undermine an individual’s
17 preference, expressed via such mechanism, not
18 to collect such information.

19 (d) PERSONAL INFORMATION.—In this section, the
20 term “personal information” includes persistent identifiers
21 such as Internet Protocol (IP) addresses, media access
22 control (MAC) addresses, and other unique device identi-
23 fiers.

24 (e) RULEMAKING.—The Federal Trade Commission
25 shall promulgate the standards and rules required by sub-

1 section (a) in accordance with section 553 of title 5,
2 United States Code.

3 **SEC. 3. ENFORCEMENT OF “DO-NOT-TRACK” MECHANISMS.**

4 (a) ENFORCEMENT BY FEDERAL TRADE COMMIS-
5 SION.—

6 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
7 TICES.—A violation of a rule promulgated under sec-
8 tion 2(a)(2) shall be treated as an unfair and decep-
9 tive act or practice in violation of a regulation under
10 section 18(a)(1)(B) of the Federal Trade Commis-
11 sion Act (15 U.S.C. 57a(a)(1)(B)) regarding unfair
12 or deceptive acts or practices.

13 (2) POWERS OF COMMISSION.—

14 (A) IN GENERAL.—Except as provided in
15 subparagraph (C), the Federal Trade Commis-
16 sion shall enforce this Act in the same manner,
17 by the same means, and with the same jurisdic-
18 tion, powers, and duties as though all applicable
19 terms and provisions of the Federal Trade
20 Commission Act (15 U.S.C. 41 et seq.) were in-
21 corporated into and made a part of this Act.

22 (B) PRIVILEGES AND IMMUNITIES.—Ex-
23 cept as provided in subparagraph (C), any per-
24 son who violates this Act shall be subject to the
25 penalties and entitled to the privileges and im-

1 communities provided in the Federal Trade Com-
2 mission Act (15 U.S.C. 41 et seq.).

3 (C) NONPROFIT ORGANIZATIONS.—The
4 Federal Trade Commission shall enforce this
5 Act with respect to an organization that is not
6 organized to carry on business for its own profit
7 or that of its members as if such organization
8 were a person over which the Commission has
9 authority pursuant to section 5(a)(2) of the
10 Federal Trade Commission Act (15 U.S.C.
11 45(a)(2)).

12 (b) ENFORCEMENT BY STATES.—

13 (1) IN GENERAL.—In any case in which the at-
14 torney general of a State has reason to believe that
15 an interest of the residents of the State has been or
16 is threatened or adversely affected by the engage-
17 ment of any person subject to a rule promulgated
18 under section 2(a)(2) in a practice that violates the
19 rule, the attorney general of the State may, as
20 *parens patriae*, bring a civil action on behalf of the
21 residents of the State in an appropriate district
22 court of the United States—

23 (A) to enjoin further violation of such rule
24 by such person;

25 (B) to compel compliance with such rule;

1 (C) to obtain damages, restitution, or other
2 compensation on behalf of such residents;

3 (D) to obtain such other relief as the court
4 considers appropriate; or

5 (E) to obtain civil penalties in the amount
6 determined under paragraph (2).

7 (2) CIVIL PENALTIES.—

8 (A) CALCULATION.—Subject to subpara-
9 graph (B), for purposes of imposing a civil pen-
10 alty under paragraph (1)(E) with respect to a
11 person that violates a rule promulgated under
12 section 2(a)(2), the amount determined under
13 this paragraph is the amount calculated by mul-
14 tiplying the number of days that the person is
15 not in compliance with the rule by an amount
16 not greater than \$16,000.

17 (B) MAXIMUM TOTAL LIABILITY.—The
18 total amount of civil penalties that may be im-
19 posed with respect to a person that violates a
20 rule promulgated under section 2(a)(2) shall
21 not exceed \$15,000,000 for all civil actions
22 brought against such person under paragraph
23 (1) for such violation.

24 (C) ADJUSTMENT FOR INFLATION.—Be-
25 ginning on the date on which the Bureau of

1 Labor Statistics first publishes the Consumer
2 Price Index after the date that is 1 year after
3 the date of the enactment of this Act, and an-
4 nually thereafter, the amounts specified in sub-
5 paragraphs (A) and (B) shall be increased by
6 the percentage increase in the Consumer Price
7 Index published on that date from the Con-
8 sumer Price Index published the previous year.

9 (3) RIGHTS OF FEDERAL TRADE COMMIS-
10 SION.—

11 (A) NOTICE TO FEDERAL TRADE COMMIS-
12 SION.—

13 (i) IN GENERAL.—Except as provided
14 in clause (iii), the attorney general of a
15 State shall notify the Federal Trade Com-
16 mission in writing that the attorney gen-
17 eral intends to bring a civil action under
18 paragraph (1) before initiating the civil ac-
19 tion.

20 (ii) CONTENTS.—The notification re-
21 quired by clause (i) with respect to a civil
22 action shall include a copy of the complaint
23 to be filed to initiate the civil action.

24 (iii) EXCEPTION.—If it is not feasible
25 for the attorney general of a State to pro-

1 vide the notification required by clause (i)
2 before initiating a civil action under para-
3 graph (1), the attorney general shall notify
4 the Federal Trade Commission imme-
5 diately upon instituting the civil action.

6 (B) INTERVENTION BY FEDERAL TRADE
7 COMMISSION.—The Federal Trade Commission
8 may—

9 (i) intervene in any civil action
10 brought by the attorney general of a State
11 under paragraph (1); and

12 (ii) upon intervening—

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

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

17 (4) INVESTIGATORY POWERS.—Nothing in this
18 subsection may be construed to prevent the attorney
19 general of a State from exercising the powers con-
20 ferred on the attorney general by the laws of the
21 State to conduct investigations, to administer oaths
22 or affirmations, or to compel the attendance of wit-
23 nesses or the production of documentary or other
24 evidence.

1 (5) PREEMPTIVE ACTION BY FEDERAL TRADE
2 COMMISSION.—If the Federal Trade Commission in-
3 stitutes a civil action or an administrative action
4 with respect to a violation of a rule promulgated
5 under section 2(a)(2), the attorney general of a
6 State may not, during the pendency of such action,
7 bring a civil action under paragraph (1) against any
8 defendant named in the complaint of the Commis-
9 sion for the violation with respect to which the Com-
10 mission instituted such action.

11 (6) VENUE; SERVICE OF PROCESS.—

12 (A) VENUE.—Any action brought under
13 paragraph (1) may be brought in—

14 (i) the district court of the United
15 States that meets applicable requirements
16 relating to venue under section 1391 of
17 title 28, United States Code; or

18 (ii) another court of competent juris-
19 diction.

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

23 (i) is an inhabitant; or

24 (ii) may be found.

25 (7) ACTIONS BY OTHER STATE OFFICIALS.—

1 (A) IN GENERAL.—In addition to civil ac-
2 tions brought by attorneys general under para-
3 graph (1), any other officer of a State who is
4 authorized by the State to do so may bring a
5 civil action under paragraph (1), subject to the
6 same requirements and limitations that apply
7 under this subsection to civil actions brought by
8 attorneys general.

9 (B) SAVINGS PROVISION.—Nothing in this
10 subsection may be construed to prohibit an au-
11 thorized official of a State from initiating or
12 continuing any proceeding in a court of the
13 State for a violation of any civil or criminal law
14 of the State.

15 (c) PRIVATE RIGHT OF ACTION.—

16 (1) IN GENERAL.—A person may, if otherwise
17 permitted by the laws or rules of court of a State,
18 bring in an appropriate court of that State—

19 (A) an action based on a violation of a rule
20 promulgated under section 2(a)(2) to enjoin
21 such violation;

22 (B) an action to recover for actual mone-
23 tary loss from such a violation, or to receive
24 \$500 in damages for each such violation, which-
25 ever is greater; or

1 (C) both such actions.

2 (2) INCREASED PENALTIES.—If the court finds
3 that the defendant willfully or knowingly violated a
4 rule promulgated under section 2(a)(2), the court
5 may, in its discretion, increase the amount of the
6 award to an amount equal to not more than 3 times
7 the amount available under paragraph (1)(B).

8 **SEC. 4. BIENNIAL REVIEW AND ASSESSMENT.**

9 Not later than 2 years after the effective date of the
10 regulations initially promulgated under section 2, the Fed-
11 eral Trade Commission shall—

12 (1) review the implementation of this Act;

13 (2) assess the effectiveness of such regulations,
14 including how such regulations define or interpret
15 the term “personal information” as such term is
16 used in section 2;

17 (3) assess the effect of such regulations on on-
18 line commerce; and

19 (4) submit to Congress a report on the results
20 of the review and assessments required by this sec-
21 tion.

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