

[DISCUSSION DRAFT]112TH CONGRESS
2^D SESSION**H. R.** _____

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

IN THE HOUSE OF REPRESENTATIVES

Mr. MARKEY introduced the following bill; which was referred to the
Committee on _____

A BILL

To require disclosures to consumers regarding the capability of software to monitor mobile telephone 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 **TELEPHONE 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 telephones directly to consumers (including a
9 provider of commercial mobile service or mobile
10 broadband service who sells mobile telephones in
11 connection with contracts to provide service) to dis-
12 close the information described in subsection (b) to
13 the consumer at the time of sale of a mobile tele-
14 phone on which monitoring software is installed;

15 (2) a provider of commercial mobile service or
16 mobile broadband service to disclose the information
17 described in subsection (b) to the consumer at the
18 time of entry into a contract to provide service to
19 the consumer on a mobile telephone—

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

7 (4) a provider of commercial mobile service or
8 mobile broadband service who installs monitoring
9 software on a mobile telephone, after entry into a
10 contract to provide service to the consumer on such
11 telephone, to disclose to the consumer at the time of
12 installing such software the information described in
13 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 tele-
17 phone 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 telephone (or, in the case of a
24 disclosure described in subsection (a)(5), the fact

1 that the software that the consumer downloads is
2 monitoring 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 (c) MANNER OF DISCLOSURE.—The regulations pro-
12 mulgated under subsection (a) shall require the disclosures
13 to be made in a clear and conspicuous manner, to be deter-
14 mined by the Federal Trade Commission.

15 **SEC. 3. CONSUMER CONSENT TO MONITORING OF MOBILE**
16 **TELEPHONE 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 obtain the express consent of the
23 consumer prior to the time when the monitoring software
24 first begins collecting and transmitting information.

1 **SEC. 4. INFORMATION SECURITY REQUIREMENTS.**

2 (a) IN GENERAL.—Not later than 1 year after the
3 date of the enactment of this Act, the Federal Trade Com-
4 mission shall promulgate regulations under section 553 of
5 title 5, United States Code, that require any person who
6 receives a transmission of information directly from moni-
7 toring software with respect to which disclosures are re-
8 quired by the regulations promulgated under section 2(a)
9 to establish and implement policies and procedures regard-
10 ing information security practices for the treatment and
11 protection of such information, taking into consider-
12 ation—

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

15 (2) the current state of the art in administra-
16 tive, technical, and physical safeguards for pro-
17 tecting such information; and

18 (3) the cost of implementing such safeguards.

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

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

24 (2) The identification of an officer or other in-
25 dividual as the point of contact with responsibility

1 for the management of the security of such informa-
2 tion.

3 (3) A process for identifying and assessing any
4 reasonably foreseeable vulnerabilities in any system
5 maintained by such person that contains such infor-
6 mation, which shall include regular monitoring for a
7 breach of security of such system.

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

14 (5) A process for disposing of such information
15 by shredding, permanently erasing, or otherwise
16 modifying such information to make such informa-
17 tion permanently unreadable or undecipherable.

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

21 (c) TREATMENT OF ENTITIES GOVERNED BY OTHER
22 LAW.—A person shall be deemed to be in compliance with
23 the regulations promulgated under subsection (a) if such
24 person is in compliance with any other Federal law that
25 requires such person to maintain policies and procedures

1 with respect to information security that, taken as a whole
2 and as the Federal Trade Commission shall determine in
3 the rulemaking required by such subsection, provide pro-
4 tections substantially similar to, or greater than, those
5 provided by the policies and procedures required by the
6 regulations promulgated under such subsection.

7 **SEC. 5. FILING WITH FTC AND FCC OF CERTAIN AGREE-**
8 **MENTS REGARDING INFORMATION TRANS-**
9 **MISSION.**

10 (a) IN GENERAL.—Not later than 1 year after the
11 date of the enactment of this Act, the Federal Trade Com-
12 mission shall promulgate regulations under section 553 of
13 title 5, United States Code, that require the parties to an
14 agreement described in subsection (b) to file a copy of
15 such agreement with the Federal Trade Commission and
16 the Federal Communications Commission. The Federal
17 Communications Commission, in consultation with the
18 Federal Trade Commission, may promulgate regulations
19 with respect to the form and manner of the filing of such
20 a copy with the Federal Communications Commission.

21 (b) AGREEMENT DESCRIBED.—An agreement de-
22 scribed in this subsection—

23 (1) is an agreement under which a person re-
24 ceives a transmission of information directly from
25 monitoring software with respect to which dislo-

1 sures are required by the regulations promulgated
2 under section 2(a); and

3 (2) does not include an agreement between such
4 a person and the consumer on whose mobile tele-
5 phone such monitoring software is installed.

6 **SEC. 6. ENFORCEMENT.**

7 (a) BY FEDERAL TRADE COMMISSION.—

8 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
9 TICES.—Except as provided in subsection (b), a vio-
10 lation of a regulation promulgated under section 2,
11 3, 4, or 5 shall be treated as a violation of a regula-
12 tion under section 18(a)(1)(B) of the Federal Trade
13 Commission Act (15 U.S.C. 57a(a)(1)(B)) regarding
14 unfair or deceptive acts or practices.

15 (2) POWERS OF FEDERAL TRADE COMMIS-
16 SION.—Except as provided in subsection (b), the
17 Federal Trade Commission shall enforce the regula-
18 tions promulgated under sections 2, 3, 4, and 5 in
19 the same manner, by the same means, and with the
20 same jurisdiction, powers, and duties as though all
21 applicable terms and provisions of the Federal Trade
22 Commission Act (15 U.S.C. 41 et seq.) were incor-
23 porated into and made a part of this Act, and any
24 person who violates such regulations shall be subject

1 to the penalties and entitled to the privileges and
2 immunities provided in that Act.

3 (b) BY FEDERAL COMMUNICATIONS COMMISSION.—

4 (1) TREATMENT AS VIOLATION OF COMMUNICA-
5 TIONS ACT OF 1934.—A violation of a regulation pro-
6 mulgated under section 2, 3, 4, or 5 by a provider
7 of commercial mobile service or mobile broadband
8 service or a manufacturer of a mobile telephone shall
9 be treated as a violation of the Communications Act
10 of 1934 (47 U.S.C. 151 et seq.).

11 (2) POWERS OF FEDERAL COMMUNICATIONS
12 COMMISSION.—The Federal Communications Com-
13 mission shall enforce the regulations promulgated
14 under sections 2, 3, 4, and 5 with respect to pro-
15 viders of commercial mobile service or mobile
16 broadband service and manufacturers of mobile tele-
17 phones in the same manner, by the same means, and
18 with the same jurisdiction, powers, and duties as
19 though all applicable terms and provisions of the
20 Communications Act of 1934 were incorporated into
21 and made a part of this Act, and any such provider
22 or manufacturer who violates such regulations shall
23 be subject to the penalties and entitled to the privi-
24 leges and immunities provided in that Act.

25 (c) CONSULTATION BETWEEN FTC AND FCC.—

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

5 (2) ENFORCEMENT.—In enforcing such regula-
6 tions, the Federal Trade Commission and the Fed-
7 eral Communications Commission shall consult with
8 each other.

9 (d) ACTIONS BY STATES.—

10 (1) CIVIL ACTIONS.—In any case in which the
11 attorney general of a State, or an official or agency
12 of a State, has reason to believe that an interest of
13 the residents of that State has been or is threatened
14 or adversely affected by an act or practice that vio-
15 lates any regulation promulgated under section 2, 3,
16 4, or 5, the State, as *parens patriae*, may bring a
17 civil action on behalf of the residents of the State in
18 an appropriate State court or an appropriate district
19 court of the United States to—

20 (A) enjoin that act or practice;

21 (B) enforce compliance with the regulation;

22 (C) obtain damages, restitution, or other
23 compensation on behalf of residents of the
24 State; or

1 (D) obtain such other legal and equitable
2 relief as the court may consider to be appro-
3 priate.

4 (2) NOTICE.—Before filing an action under this
5 subsection, the attorney general, official, or agency
6 of the State involved shall provide to the appropriate
7 Commission a written notice of that action and a
8 copy of the complaint for that action. If the attorney
9 general, official, or agency determines that it is not
10 feasible to provide the notice described in this para-
11 graph before the filing of the action, the attorney
12 general, official, or agency shall provide written no-
13 tice of the action and a copy of the complaint to the
14 appropriate Commission immediately upon the filing
15 of the action.

16 (3) AUTHORITY OF APPROPRIATE COMMIS-
17 SION.—

18 (A) IN GENERAL.—On receiving notice
19 under paragraph (2) of an action under this
20 subsection, the appropriate Commission shall
21 have the right—

22 (i) to intervene in the action;

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

25 (iii) to file petitions for appeal.

1 (B) LIMITATION ON STATE ACTION WHILE
2 FEDERAL ACTION IS PENDING.—If the appro-
3 priate Commission or the Attorney General of
4 the United States has instituted a civil action
5 for violation of a regulation promulgated under
6 section 2, 3, 4, or 5 (referred to in this sub-
7 paragraph as the “Federal action”), no State
8 attorney general, official, or agency may bring
9 an action under this subsection during the
10 pendency of the Federal action against any de-
11 fendant named in the complaint in the Federal
12 action for any violation as alleged in that com-
13 plaint.

14 (4) RULE OF CONSTRUCTION.—For purposes of
15 bringing a civil action under this subsection, nothing
16 in this Act shall be construed to prevent an attorney
17 general, official, or agency of a State from exercising
18 the powers conferred on the attorney general, offi-
19 cial, or agency by the laws of that State to conduct
20 investigations, administer oaths and affirmations, or
21 compel the attendance of witnesses or the production
22 of documentary and other evidence.

23 (5) APPROPRIATE COMMISSION DEFINED.—In
24 this subsection, the term “appropriate Commission”
25 means the Federal Trade Commission, except that,

1 in the case of a civil action against a provider of
2 commercial mobile service or mobile broadband serv-
3 ice or a manufacturer of a mobile telephone, such
4 term means the Federal Communications Commis-
5 sion.

6 (e) PRIVATE RIGHT OF ACTION.—

7 (1) IN GENERAL.—A person injured by an act
8 in violation of a regulation promulgated under sec-
9 tion 2, 3, 4, or 5 may bring in an appropriate State
10 court or an appropriate district court of the United
11 States—

12 (A) an action to enjoin such violation;

13 (B) an action to recover damages for ac-
14 tual monetary loss from such violation, or to re-
15 ceive up to \$1000 in damages for each such vio-
16 lation, whichever is greater; or

17 (C) both such actions.

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

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

5 (4) LIMITATION.—An action may be com-
6 menced under this subsection not later than 2 years
7 after the date on which the person first discovered
8 or had a reasonable opportunity to discover the vio-
9 lation.

10 (5) NONEXCLUSIVE REMEDY.—The remedy pro-
11 vided by this subsection shall be in addition to any
12 other remedies available to the person, except that,
13 in the case of a violation or series of related viola-
14 tions by a provider of commercial mobile service or
15 mobile broadband service or a manufacturer of a
16 mobile telephone, the person may pursue either the
17 remedy provided under this subsection or the rem-
18 edies provided under title II of the Communications
19 Act of 1934 (47 U.S.C. 201 et seq.), but not both.

20 **SEC. 7. RULE OF CONSTRUCTION.**

21 For purposes of this Act, the transmission of infor-
22 mation does not include transmission to the provider of
23 commercial mobile service or mobile broadband service
24 who provides such service on the mobile telephone on
25 which such transmission originates.

1 **SEC. 8. DEFINITIONS.**

2 In this Act:

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

7 (2) **MONITORING SOFTWARE.**—The term “mon-
8 itoring software” means software that has the capa-
9 bility automatically to monitor the usage of a mobile
10 telephone or the location of the user and to transmit
11 the information collected to another device or sys-
12 tem, whether or not such capability is the primary
13 function of the software or the purpose for which the
14 software is marketed.