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SENATE BILL NO. 684

Offered January 18, 2024

A BILL to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 57, consisting of sections numbered 59.1-603 through 59.1-607, relating to Online Children's Safety Protection Act established; civil penalties.

Patron—Stanley

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 57, consisting of sections numbered 59.1-603 through 59.1-607, as follows:

CHAPTER 57.

ONLINE CHILDREN'S SAFETY PROTECTION ACT.

§ 59.1-603. Definitions.

As used in this chapter, unless the context requires otherwise:

"Best interests of a child" means a child's privacy, safety, mental and physical health, access to information, freedom to participate in society, meaningful access to digital technologies, and well-being.

"Child" means a consumer who a covered entity has actual knowledge is younger than 18 years of age.

For the purpose of this definition, if a covered entity chooses to conduct age estimation to determine which user is a consumer younger than 18 years of age, the covered entity shall not be considered to have actual knowledge for data processing undertaken during the period when the covered entity is estimating age or for an erroneous estimation or for data processing in the absence of reasonable evidence that a user is a consumer younger than 18 years of age.

"Collect" means the act of buying, renting, gathering, obtaining, receiving, or accessing personal data pertaining to a consumer by any means. "Collect" includes receiving information from a consumer, either actively or passively, or by observing the consumer's behavior.

"Consumer" means the same as that term is defined in § 59.1-575.

"Covered entity" means a business or organization that knowingly processes a child's personal data.

"Dark pattern" means a user interface knowingly designed with the intended purpose of subverting or impairing user decision-making or choice.

"Data protection impact assessment" means a systematic survey to assess compliance with the duty to act in the best interests of a child.

"Default" means a preselected option adopted by a covered entity for the online service, product, or feature.

"Deidentified data" means data that (i) cannot reasonably be linked to an identified or identifiable natural person or a device linked to such person and (ii) is in possession of a covered entity that (a) takes reasonable technical and administrative measures to prevent the data from being reidentified; (b) does not attempt to reidentify the data and publicly commits not to attempt to reidentify the data; and (c) contractually obligates a person to which the covered entity transfers the data to comply with the requirements of this clause (ii).

"Identified or identifiable natural person" means a person who can be readily identified, directly or indirectly.

"Likely to be accessed by a child" means it is reasonable to expect, based on the following indicators, that an online service, product, or feature would be accessed by a child:

1. The online service, product, or feature is directed to a child, as defined in 15 U.S.C. § 6501; and

2. The online service, product, or feature is determined, based on competent and reliable evidence regarding audience composition, to be routinely accessed by a significant number of children.

"Online service, product, or feature" does not include a telecommunications service, as defined in 47 U.S.C. § 153(53), or the delivery or use of a physical product.

"Personal data" means the same as that term is defined in § 59.1-575.

"Precise geolocation data" means data that is derived from technology and used or intended to be used to locate a consumer with precision and accuracy within a radius of 1,850 feet.

"Profile" or "profiling" means any form of automated processing performed on personal data to evaluate, analyze, or predict personal aspects related to an identified or identifiable natural person's economic situation, health, personal preferences, interests, reliability, behavior, location, or movements. "Profile" or "profiling" does not include processing that does not result in some assessment or judgment about an identified or identifiable natural person.

§ 59.1-604. Duties of covered entities.

59 A covered entity that provides an online service, product, or feature likely to be accessed by a child shall  
60 have the following duties:

61 1. Within two years before any new online service, product, or feature is offered to the public on or after  
62 July 1, 2024, complete a data protection impact assessment in accordance with § 59.1-605 for an online  
63 service, product, or feature likely to be accessed by a child. In completing such data protection impact  
64 assessment, the covered entity shall consider the type of processing used in the online service, product, or  
65 feature, including new technology, and take into account the nature, scope, context, and purpose of the  
66 processing that is likely to result in high risk to a child.

67 2. Maintain documentation of each data protection impact assessment completed pursuant to subdivision  
68 1 during the time period when the online service, product, or feature is reasonably likely to be accessed by a  
69 child and uses processing that is likely to result in high risk to a child.

70 3. Review each data protection impact assessment completed pursuant to subdivision 1 as necessary to  
71 account for any significant change to the processing operations of an online service, product, or feature.

72 4. Make each data protection impact assessment completed pursuant to subdivision 1 available, within a  
73 reasonable time period, to the Attorney General upon written request. Nothing in this subdivision shall be  
74 construed to require the covered entity to disclose information to the Attorney General in a manner that  
75 would disclose the covered entity's trade secrets.

76 5. Configure default privacy settings provided to a child by an online service, product, or feature to  
77 settings that offer a high level of privacy, unless the underlying processing enhances the child's experience of  
78 the online service, product, or feature and the covered entity offers settings to control the use of the child's  
79 data for the purpose of enhancing the child's experience. If default privacy settings meet the criteria specified  
80 under this subdivision, the default privacy settings shall not be considered a dark pattern.

81 **§ 59.1-605. Data protection impact assessments.**

82 A. A covered entity shall include all of the following information in a data protection impact assessment  
83 required under subdivision 1 of § 59.1-604:

84 1. The purpose of an online service, product, or feature provided by the covered entity;

85 2. The manner in which the online service, product, or feature uses a child's personal data; and

86 3. A determination as to whether the online service, product, or feature is designed and offered in a  
87 manner consistent with the best interests of a child who is reasonably likely to access the online service,  
88 product, or feature. In making such determination, the covered entity shall include all of the following  
89 information:

90 a. A systematic description of the anticipated processing operations and the purpose of the processing;

91 b. An assessment of the necessity and proportionality of the processing operations in relation to the  
92 purpose of the processing. For the purpose of this subdivision, a single assessment may address a set of  
93 similar processing operations that present similar risks;

94 c. An assessment of the risks to the rights and freedoms of a child; and

95 d. The measures anticipated to address the risks, including safeguards, security measures, and  
96 mechanisms, to ensure the protection of personal data and to demonstrate compliance with this chapter,  
97 taking into account the rights and freedoms of a child.

98 B. Notwithstanding any other provision of law, a data protection impact assessment required under  
99 subdivision 1 of § 59.1-604 shall be protected as confidential and shall not be subject to the provisions of the  
100 Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

101 C. To the extent information contained in a data protection impact assessment required under subdivision  
102 1 of § 59.1-604 and disclosed to the Attorney General under subdivision 4 of § 59.1-604 includes information  
103 subject to attorney-client privilege or work product protection, the disclosure shall not constitute a waiver of  
104 attorney-client privilege or work product protection.

105 D. A data protection impact assessment conducted by a covered entity for the purpose of compliance with  
106 any other law of the Commonwealth shall be deemed to comply with the requirements of this chapter.

107 **§ 59.1-606. Prohibition on certain actions by covered entities.**

108 No covered entity that provides an online service, product, or feature reasonably likely to be accessed by  
109 a child shall:

110 1. Use the personal data of a child likely to access the online service, product, or feature in a way that the  
111 covered entity knows is likely to result in high risk to the child on the basis of a data protection impact  
112 assessment required under subdivision 1 of § 59.1-604 if the high risk has not been suitably mitigated  
113 through measures identified in the data protection impact assessment.

114 2. Profile a child by default if the profiling has been identified as high risk to the child on the basis of a  
115 data protection impact assessment required under subdivision 1 of § 59.1-604 unless the high risk has been  
116 suitably mitigated through measures identified in the data protection impact assessment. If the covered entity  
117 profiles by default, there shall be a presumption that the profiling does not violate this subdivision if (i) the  
118 covered entity can demonstrate that the covered entity has appropriate safeguards in place to protect a child;  
119 (ii) the profiling is necessary to provide the online service, product, or feature requested and only used

120 regarding the aspects of the online service, product, or feature with which a child is actively and knowingly  
121 engaged; and (iii) the profiling enhances a child's experience on an online service, product, or feature and  
122 the covered entity offers settings to control the use of the child's data for the purpose of enhancing the child's  
123 experience.

124 3. Collect, retain, process, or disclose the personal data of a child in a manner that has been identified as  
125 high risk to the child on the basis of a data protection impact assessment required under subdivision 1 of §  
126 59.1-604 unless the high risk has been suitably mitigated through measures identified in the data protection  
127 impact assessment.

128 4. If the end user is a child, use personal data for any reason other than a reason for which that personal  
129 data was collected, unless the covered entity can demonstrate a compelling reason that use of the personal  
130 data is in the best interests of a child.

131 5. Collect, sell, process, or retain the precise geolocation information of a child by default unless (i) the  
132 covered entity can demonstrate a compelling reason that such activities are in the best interests of a child or  
133 (ii) the processing enhances a child's experience of an online service, product, or feature and the covered  
134 entity offers settings to control the use of the child's data for the purposes of enhancing the child's experience.

135 6. Track the precise geolocation information of a child without providing notice regarding the tracking of  
136 the child's precise geolocation information.

137 7. Use dark patterns to knowingly lead or encourage a child to (i) provide personal data in excess of what  
138 is reasonably expected to furnish an online service, product, or feature; (ii) forgo privacy protections; or (iii)  
139 take any action that the covered entity knows is not in the best interests of a child reasonably likely to access  
140 the online service, product, or feature.

141 **§ 59.1-607. Enforcement; civil penalties; expenses.**

142 A. The Attorney General shall have exclusive authority to enforce the provisions of this chapter.

143 B. Prior to initiating any action under this chapter, the Attorney General shall provide a covered entity 90  
144 days' written notice identifying the specific provisions of this chapter the Attorney General alleges have been  
145 or are being violated. If within the 90-day period the covered entity cures the noticed violation and provides  
146 the Attorney General an express written statement that the alleged violations have been cured and that no  
147 further violations shall occur, no action shall be initiated against the covered entity.

148 C. If a covered entity continues to violate this chapter following the cure period in subsection B or  
149 breaches an express written statement provided to the Attorney General under that subsection, the Attorney  
150 General may initiate an action in the name of the Commonwealth and may seek an injunction to restrain any  
151 violations of this chapter and civil penalties of no more than \$2,500 per affected child for each negligent  
152 violation or no more than \$7,500 per affected child for each intentional violation under this chapter. All civil  
153 penalties, expenses, and attorney fees collected pursuant to this chapter shall be paid into the state treasury  
154 and credited to the Regulatory, Consumer Advocacy, Litigation, and Enforcement Revolving Trust Fund.

155 D. The Attorney General may recover reasonable expenses incurred in investigating and preparing the  
156 case, including attorney fees, in any action initiated under this chapter.

157 E. Nothing in this chapter shall be construed as providing the basis for, or be subject to, a private right of  
158 action for violations of this chapter or under any other law.

159 F. Compliance by a covered entity with the federal Children's Online Privacy Protection Act, 15 U.S.C. §  
160 6501 et seq., shall constitute compliance with this chapter for a child younger than 13 years of age.