

**[DISCUSSION DRAFT]**112<sup>TH</sup> CONGRESS  
2<sup>D</sup> 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.

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**IN THE HOUSE OF REPRESENTATIVES**

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

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**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.