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2D SESSION

S. 3663

To protect the privacy of consumers’ personal health information, proximity data, device data, and geolocation data during the coronavirus public health crisis.

IN THE SENATE OF THE UNITED STATES

MAY 7, 2020

Mr. WICKER (for himself, Mr. THUNE, Mr. MORAN, Mrs. BLACKBURN, and Mrs. FISCHER) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To protect the privacy of consumers’ personal health information, proximity data, device data, and geolocation data during the coronavirus public health crisis.

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 “COVID–19 Consumer
5 Data Protection Act of 2020”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

8 (1) **AGGREGATED DATA.**—The term “aggre-
9 gated data” means information that—

1 (A) relates to a group or category of indi-
2 viduals; and

3 (B) does not identify, and is not linked or
4 reasonably linkable to, any individual.

5 (2) AFFIRMATIVE EXPRESS CONSENT.—

6 (A) IN GENERAL.—The term “affirmative
7 express consent” means an affirmative act by
8 an individual that—

9 (i) clearly communicates the individ-
10 ual’s authorization of an act or practice;
11 and

12 (ii) is taken after the individual has
13 been presented with a clear and con-
14 spicuous description of such act or prac-
15 tice.

16 (B) NO INFERENCE FROM INACTION.—For
17 purposes of subparagraph (A), the affirmative
18 express consent of an individual cannot be in-
19 ferred from inaction.

20 (3) BUSINESS CONTACT INFORMATION.—The
21 term “business contact information” means informa-
22 tion related to an individual’s business position
23 name or title, business telephone number, business
24 address, business email address, and other similar
25 business information, provided that such information

1 is collected, processed, or transferred solely for pur-
2 poses related to such individual's professional activi-
3 ties.

4 (4) COLLECTION.—The term “collection”
5 means buying, renting, gathering, accessing, or oth-
6 erwise acquiring any covered data of an individual
7 by any means.

8 (5) COMMISSION.—The term “Commission”
9 means the Federal Trade Commission.

10 (6) COVERED DATA.—

11 (A) IN GENERAL.—The term “covered
12 data” means precise geolocation data, proximity
13 data, a persistent identifier, and personal health
14 information.

15 (B) EXCLUSIONS.—Such term does not in-
16 clude the following:

- 17 (i) Aggregated data.
- 18 (ii) Business contact information.
- 19 (iii) De-identified data.
- 20 (iv) Employee screening data.
- 21 (v) Publicly available information.

22 (7) COVERED ENTITY.—The term “covered en-
23 tity” means, with respect to a set of covered data,
24 any entity or person that—

25 (A) is—

1 (i) subject to the Federal Trade Com-
 2 mission Act (15 U.S.C. 41 et seq.); or

3 (ii) a common carrier or nonprofit or-
 4 ganization described in section 4(a)(4);

5 (B) collects, processes, or transfers such
 6 covered data, or determines the means and pur-
 7 poses for the collection, processing, or transfer
 8 of covered data; and

9 (C) is not a service provider with respect
 10 to such data.

11 (8) COVID–19 PUBLIC HEALTH EMERGENCY.—

12 The term “COVID–19 public health emergency”
 13 means the period—

14 (A) beginning on the date of enactment of
 15 this Act; and

16 (B) ending on the last day of the public
 17 health emergency declared by the Secretary of
 18 Health and Human Services pursuant to sec-
 19 tion 319 of the Public Health Service Act (42
 20 U.S.C. 247d) on January 31, 2020, entitled
 21 “Determination that a Public Health Emer-
 22 gency Exists Nationwide as the Result of the
 23 2019 Novel Coronavirus” (including any re-
 24 newal of such declaration pursuant to such sec-
 25 tion 319).

1 (9) DE-IDENTIFIED DATA.—The term “de-iden-
2 tified data” means information held by a covered en-
3 tity that—

4 (A) does not identify and is not reasonably
5 linkable to an individual;

6 (B) does not contain any personal identi-
7 fiers or other information that could be readily
8 used to re-identify the individual to whom the
9 information pertains;

10 (C) is subject to a public commitment by
11 the covered entity—

12 (i) to refrain from attempting to use
13 such information to identify any individual;
14 and

15 (ii) to adopt technical and organiza-
16 tional measures to ensure that such infor-
17 mation is not linked to any individual; and

18 (D) is not disclosed by the covered entity
19 to any other party unless the disclosure is sub-
20 ject to a contractually or other legally binding
21 requirement that—

22 (i) the recipient of the information
23 shall not use the information to identify
24 any individual; and

1 (ii) all onward disclosures of the infor-
2 mation shall be subject to the requirement
3 described in clause (i).

4 (10) EMPLOYEE SCREENING DATA.—The term
5 “employee screening data” means, with respect to a
6 covered entity, covered data of an individual who is
7 an employee, owner, director, officer, staff member,
8 trainee, vendor, visitor, intern, volunteer, or con-
9 tractor of the covered entity, provided that such data
10 is only collected, processed, or transferred by the
11 covered entity for the purpose of determining, for
12 purposes related to the COVID–19 public health
13 emergency, whether the individual is permitted to
14 enter a physical site of operation of the covered enti-
15 ty.

16 (11) DELETE.—The term “delete” means to re-
17 move or destroy information such that it is not
18 maintained in human or machine readable form and
19 cannot be retrieved or utilized in the normal course
20 of business.

21 (12) INDIVIDUAL.—

22 (A) IN GENERAL.—The term “individual”
23 means a natural person residing in the United
24 States.

1 (B) EXCLUSION.—Such term does not in-
 2 clude, with respect to a covered entity, an indi-
 3 vidual acting as a full-time or part-time, paid or
 4 unpaid employee, owner, director, officer, staff
 5 member, trainee, vendor, visitor, intern, volun-
 6 teer, or contractor of a covered entity permitted
 7 to enter a physical site of operation of the cov-
 8 ered entity.

9 (13) PERSISTENT IDENTIFIER.—The term
 10 “persistent identifier” means a technologically de-
 11 rived identifier that identifies an individual, or is
 12 linked or reasonably linkable to an individual over
 13 time and across services and platforms, which may
 14 include a customer number held in a cookie, a static
 15 Internet Protocol (IP) address, a processor or device
 16 serial number, or another unique device identifier.

17 (14) PERSONAL HEALTH INFORMATION.—

18 (A) IN GENERAL.—The term “personal
 19 health information” means information relating
 20 to an individual that—

21 (i) is—

22 (I) genetic information of the in-
 23 dividual; or

24 (II) information relating to the
 25 diagnosis or treatment of past,

1 present, or future physical, mental
2 health, or disability of the individual;
3 and

4 (ii) identifies, or is reasonably linkable
5 to, the individual.

6 (B) EXCLUSIONS.—Such term does not in-
7 clude the following:

8 (i) Information from education
9 records that are subject to the require-
10 ments of section 444 of the General Edu-
11 cation Provisions Act (20 U.S.C. 1232g,
12 commonly referred to as the “Family Edu-
13 cational Rights and Privacy Act of 1974”)
14 or from records described in subsection
15 (a)(4)(B)(iv) of such section.

16 (ii) Information subject to regulations
17 promulgated pursuant to section 264(c) of
18 the Health Insurance Portability and Ac-
19 countability Act of 1996 (42 U.S.C.
20 1320d–2 note).

21 (15) PRECISE GEOLOCATION DATA.—The term
22 “precise geolocation data” means technologically de-
23 rived information capable of determining with rea-
24 sonable specificity the past or present actual phys-

1 ical location of an individual at a specific point in
2 time.

3 (16) PROCESS.—The term “process” means
4 any operation or set of operations performed on cov-
5 ered data, including analyzing, organizing, struc-
6 turing, retaining, using, or otherwise handling such
7 data.

8 (17) PROXIMITY DATA.—The term “proximity
9 data” means technologically derived information that
10 identifies the past or present proximity of one indi-
11 vidual to another.

12 (18) PUBLICLY AVAILABLE INFORMATION.—
13 The term “publicly available information” means
14 any information that—

15 (A) has been lawfully made available to the
16 general public from Federal, State, or local gov-
17 ernment records; or

18 (B) is widely available to the general pub-
19 lic, including information from—

20 (i) a telephone book or online direc-
21 tory;

22 (ii) video, internet, or audio content;

23 or

24 (iii) the news media or a website that
25 is available to the general public on an un-

1 restricted basis (for purposes of this sub-
 2 clause a website is not restricted solely be-
 3 cause there is a fee or log-in requirement
 4 associated with accessing the website).

5 (19) SERVICE PROVIDER.—The term “service
 6 provider” means, with respect to a set of covered
 7 data, an entity that processes or transfers such cov-
 8 ered data for the purpose of performing one or more
 9 services or functions on behalf of, and at the direc-
 10 tion of, a covered entity to which it is not related.

11 (20) TRANSFER.—The term “transfer” means
 12 to disclose, release, share, disseminate, or otherwise
 13 make available covered data by any means.

14 **SEC. 3. PRIVACY OF COVERED DATA.**

15 (a) IN GENERAL.—During the COVID–19 public
 16 health emergency, it shall be unlawful for a covered entity
 17 to collect, process, or transfer the covered data of an indi-
 18 vidual for a purpose described in subsection (b) unless—

19 (1) the covered entity provides the individual
 20 with prior notice of the purpose for such collection,
 21 processing, or transfer;

22 (2) the individual has given affirmative express
 23 consent to such collection, processing, or transfer;
 24 and

1 (3) the covered entity publicly commits not to
 2 collect, process, or transfer such covered data for a
 3 purpose other than the purpose described in sub-
 4 section (b) to which the individual consented un-
 5 less—

6 (A) such collection, processing, or transfer
 7 is necessary to comply with the provisions of
 8 this Act or other applicable laws;

9 (B) such collection, processing, or transfer
 10 is necessary to carry out operational or admin-
 11 istrative tasks in support of a purpose described
 12 in subsection (b) to which the individual has
 13 consented; or

14 (C) the individual gives affirmative express
 15 consent to such collection, processing, or trans-
 16 fer.

17 (b) COVERED PURPOSES.—The purposes described in
 18 this subsection are the following:

19 (1) Collecting, processing, or transferring the
 20 covered data of an individual to track the spread,
 21 signs, or symptoms of COVID–19.

22 (2) Collecting, processing, or transferring the
 23 covered data of an individual to measure compliance
 24 with social distancing guidelines or other require-
 25 ments related to COVID–19 that are imposed on in-

1 individuals under a Federal, State, or local govern-
2 ment order.

3 (3) Collecting, processing, or transferring the
4 covered data of an individual to conduct contact
5 tracing for COVID–19 cases.

6 (c) TRANSPARENCY.—

7 (1) PRIVACY POLICY.—A covered entity that
8 collects, processes, or transfers covered data for a
9 purpose described in subsection (b) shall, not later
10 than 14 days after the enactment of this Act, pub-
11 lish a privacy policy that—

12 (A) is disclosed in a clear and conspicuous
13 manner to an individual prior to or at the point
14 of the collection of covered data for such a pur-
15 pose from the individual;

16 (B) is made available in a clear and con-
17 spicuous manner to the public;

18 (C) includes whether, subject to the affirm-
19 ative express consent requirement of subsection
20 (a), the covered entity transfers covered data
21 for such a purpose and the categories of recipi-
22 ents to whom the covered entity transfers cov-
23 ered data for such purpose;

24 (D) includes a general description of the
25 covered entity’s data retention practices for cov-

1 ered data used for a purpose described in sub-
2 section (b) and the purposes for such retention;
3 and

4 (E) includes a general description of the
5 covered entity's data security practices.

6 (2) REPORTING.—During the COVID–19 public
7 health emergency, a covered entity that collects,
8 processes, or transfers covered data for a purpose
9 described in subsection (b) shall issue a public report
10 not later than 30 days after the enactment of this
11 Act and not less frequently than once every 60 days
12 thereafter—

13 (A) stating in aggregate terms the number
14 of individuals whose covered data the entity has
15 collected, processed, or transferred for such a
16 purpose; and

17 (B) describing the categories of covered
18 data collected, processed, or transferred by the
19 entity, the specific purposes for which each such
20 category of covered data is collected, processed,
21 or transferred, and, in the case of transferred
22 covered data, to whom such data was trans-
23 ferred.

24 (d) RIGHT TO OPT-OUT.—During the COVID–19
25 public health emergency, each covered entity that collects,

1 processes, or transfers covered data for a purpose de-
2 scribed in subsection (b) shall do the following:

3 (1) The covered entity shall provide an effective
4 mechanism for an individual who has consented pur-
5 suant to subsection (a) to the collection, processing,
6 or transfer of the individual's covered data for such
7 a purpose to revoke such consent.

8 (2) A covered entity that receives a revocation
9 of consent from an individual described in paragraph
10 (1) shall, as soon as practicable but in no case later
11 than 14 days after receiving such revocation, stop
12 collecting, processing, or transferring the covered
13 data of such individual for a purpose described in
14 subsection (b), or shall de-identify all such data.

15 (e) DATA DELETION.—A covered entity shall delete
16 or de-identify all covered data collected, processed, or
17 transferred for a purpose described in subsection (b) when
18 it is no longer being used for such purpose and is no
19 longer necessary to comply with a Federal, State, or local
20 legal obligation, or the establishment, exercise, or defense
21 of a legal claim.

22 (f) DATA ACCURACY.—A covered entity shall take
23 reasonable measures to ensure the accuracy of covered
24 data collected, processed, or transferred for a purpose de-
25 scribed in subsection (b) and shall provide an effective

1 mechanism for an individual to report inaccuracies in cov-
2 ered data.

3 (g) DATA MINIMIZATION.—

4 (1) IN GENERAL.—During the COVID–19 pub-
5 lic health emergency, a covered entity that collects,
6 processes, or transfers covered data for a purpose
7 described in subsection (b) shall not collect, process,
8 or transfer covered data beyond what is reasonably
9 necessary, proportionate, and limited to carry out
10 such purpose.

11 (2) GUIDELINES.—Not later than 30 days after
12 the date of enactment of this Act, the Commission
13 shall issue guidelines recommending best practices
14 for covered entities to minimize the collection, proc-
15 essing, and transfer of covered data in accordance
16 with this subsection.

17 (h) PROTECTION OF COVERED DATA.—During the
18 COVID–19 public health emergency, a covered entity that
19 collects, processes, or transfers covered data for a purpose
20 described in subsection (b) shall establish, implement, and
21 maintain reasonable administrative, technical, and phys-
22 ical data security policies and practices to protect against
23 risks to the confidentiality, security, and integrity of such
24 data.

1 (i) EXCEPTION.—Notwithstanding subsection (a), a
2 covered entity may collect, process, or transfer the covered
3 data of an individual or group of individuals for a purpose
4 described in subsection (b) during the COVID–19 public
5 health emergency without obtaining the affirmative ex-
6 press consent of the individual if such collection, proc-
7 essing, or transfer is necessary to allow the covered entity
8 to comply with a Federal, State, or local legal obligation.

9 **SEC. 4. ENFORCEMENT.**

10 (a) ENFORCEMENT BY FEDERAL TRADE COMMIS-
11 SION.—

12 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
13 TICES.—A violation of this Act shall be treated as
14 a violation of a regulation under section 18(a)(1)(B)
15 of the Federal Trade Commission Act (15 U.S.C.
16 57a(a)(1)(B)) regarding unfair or deceptive acts or
17 practices.

18 (2) POWERS OF COMMISSION.—Except as pro-
19 vided in paragraph (4), the Commission shall en-
20 force this Act in the same manner, by the same
21 means, and with the same jurisdiction, powers, and
22 duties as though all applicable terms and provisions
23 of the Federal Trade Commission Act (15 U.S.C. 41
24 et seq.) were incorporated into and made a part of
25 this Act. Any person who violates such section shall

1 be subject to the penalties and entitled to the privi-
2 leges and immunities provided in the Federal Trade
3 Commission Act. Except as provided in subsection
4 (c), enforcement by the Commission shall be the ex-
5 clusive means of enforcing compliance with this Act.

6 (3) COOPERATION WITH OTHER AGENCIES.—

7 Whenever the Commission obtains information that
8 any covered entity may have processed or trans-
9 ferred covered data in violation of Federal anti-dis-
10 crimination laws, the Commission shall transmit the
11 information to the appropriate Federal or State
12 agency with authority to initiate proceedings related
13 to such violation.

14 (4) COMMON CARRIERS AND NONPROFIT ORGA-

15 NIZATIONS.—Notwithstanding section 4, 5(a)(2), or
16 6 of the Federal Trade Commission Act (15 U.S.C.
17 44, 45(a)(2), 46) or any jurisdictional limitation of
18 the Commission, the Commission shall also enforce
19 this Act in the same manner provided in paragraphs
20 (1) and (2) of this subsection with respect to—

21 (A) common carriers subject to the Com-
22 munications Act of 1934 (47 U.S.C. 151 et
23 seq.) and all Acts amendatory thereof and sup-
24 plementary thereto; and

1 (B) organizations not organized to carry
2 on business for their own profit or that of their
3 members.

4 (b) EFFECT ON OTHER LAWS.—

5 (1) IN GENERAL.—Nothing in this Act shall be
6 construed in any way to limit the authority of the
7 Commission under any other provision of law.

8 (2) NONAPPLICATION OF FCC LAWS AND REGU-
9 LATIONS TO COVERED ENTITIES.—Notwithstanding
10 any other provision of law, neither any provision of
11 the Communications Act of 1934 (47 U.S.C. 151 et.
12 seq.) and all Acts amendatory thereof and supple-
13 mentary thereto nor any regulation promulgated by
14 the Federal Communications Commission under
15 such Acts shall apply to any covered entity with re-
16 spect to the collection, processing, or transferring of
17 covered data for a purpose described in section 3(b),
18 except to the extent that such provision or regula-
19 tion pertains solely to “911” lines or any other
20 emergency line of a hospital, medical provider or
21 service office, health care facility, poison control cen-
22 ter, fire protection agency, or law enforcement agen-
23 cy.

24 (3) STATE PREEMPTION.—No State or political
25 subdivision of a State may adopt, maintain, enforce,

1 or continue in effect any law, regulation, rule, re-
 2 quirement, or standard to the extent that such law,
 3 regulation, rule, requirement, or standard is related
 4 to the collection, processing, or transfer of covered
 5 data for a purpose described in section 3(b).

6 (c) ENFORCEMENT BY STATE ATTORNEYS GEN-
 7 ERAL.—

8 (1) IN GENERAL.—In any case in which the at-
 9 torney general of a State has reason to believe that
 10 an interest of the residents of that State has been
 11 or is adversely affected by the engagement of any
 12 covered entity in an act or practice that violates this
 13 Act, the attorney general of the State, as *parens*
 14 *patriae*, may bring a civil action on behalf of the
 15 residents of the State in an appropriate district
 16 court of the United States to—

17 (A) enjoin that act or practice;

18 (B) enforce compliance with this Act or the
 19 regulation;

20 (C) obtain damages, civil penalties, restituti-
 21 on, or other compensation on behalf of the
 22 residents of the State; or

23 (D) obtain such other relief as the court
 24 may consider to be appropriate.

25 (2) RIGHTS OF THE COMMISSION.—

1 (A) IN GENERAL.—Except where not fea-
2 sible, the attorney general of a State shall no-
3 tify the Commission in writing prior to initi-
4 ating a civil action under paragraph (1). Such
5 notice shall include a copy of the complaint to
6 be filed to initiate such action. Upon receiving
7 such notice, the Commission may intervene in
8 such action and, upon intervening—

9 (i) be heard on all matters arising in
10 such action; and

11 (ii) file petitions for appeal of a deci-
12 sion in such action.

13 (B) NOTIFICATION TIMELINE.—Where it is
14 not feasible for the attorney general of a State
15 to provide the notification required by subpara-
16 graph (A) before initiating a civil action under
17 paragraph (1), the attorney general shall notify
18 the Commission immediately after initiating the
19 civil action.

20 (3) ACTIONS BY COMMISSION.—In any case in
21 which a civil action is instituted by the Commission
22 for violation of this Act, no attorney general of a
23 State may, during the pendency of such action, insti-
24 tute a civil action against any defendant named in
25 the complaint in the action instituted by the Com-

1 mission for a violation of this Act that is alleged in
2 such complaint.

3 (4) INVESTIGATORY POWERS.—Nothing in this
4 Act shall be construed to prevent the attorney gen-
5 eral of a State or another authorized official of a
6 State from exercising the powers conferred on the
7 attorney general or the State official by the laws of
8 the State to conduct investigations, to administer
9 oaths or affirmations, or to compel the attendance of
10 witnesses or the production of documentary or other
11 evidence.

12 (5) CONSOLIDATION OF ACTIONS BROUGHT BY
13 TWO OR MORE STATE ATTORNEYS GENERAL OR AU-
14 THORIZED STATE GOVERNMENTAL AUTHORITIES.—
15 Whenever a civil action under paragraph (1) is pend-
16 ing and another civil action or actions are com-
17 menced pursuant to such paragraph in a different
18 Federal district court or courts that involve 1 or
19 more common questions of fact, such action or ac-
20 tions shall be transferred for the purposes of consoli-
21 dated pretrial proceedings and trial to the United
22 States District Court for the District of Columbia;
23 provided however, that no such action shall be trans-
24 ferred if pretrial proceedings in that action have
25 been concluded before a subsequent action is filed by

- 1 a State attorney general or authorized State govern-
- 2 mental authority.

