

SENATE BILL NO. 684

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology

on _____)

(Patron Prior to Substitute--Senator Stanley)

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.

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 an operator has actual knowledge is younger than 18 years of age. For the purpose of this definition, if an operator chooses to conduct age estimation to determine which user is a consumer younger than 18 years of age, the operator shall not be considered to have actual knowledge for data processing undertaken during the period when the operator 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.

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

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

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

32 "Default" means a preselected option adopted by an operator for the online service, product, or
33 feature.

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

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

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

- 44 1. The online service, product, or feature is directed to a child, as defined in 15 U.S.C. § 6501; and
- 45 2. The online service, product, or feature is determined, based on competent and reliable evidence
46 regarding audience composition, to be routinely accessed by a significant number of children.

47 "Online service, product, or feature" does not include a telecommunications service, as defined in
48 47 U.S.C. § 153(53), or the delivery or use of a physical product.

49 "Operator" means the same as that term is defined in 15 U.S.C. § 6501.

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

51 "Precise geolocation data" means data that is derived from technology and used or intended to be
52 used to locate a consumer with precision and accuracy within a radius of 1,750 feet.

53 "Process" or "processing" means the same as those terms are defined in § 59.1-575.

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

59 **§ 59.1-604. Duties of operators.**

60 An operator that provides an online service, product, or feature likely to be accessed by a child
61 shall have the following duties:

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

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

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

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

78 5. Configure default privacy settings provided to a child by an online service, product, or feature
79 to settings that offer a high level of privacy, unless the underlying processing enhances the child's
80 experience of the online service, product, or feature and the operator offers settings to control the use of

81 the child's data for the purpose of enhancing the child's experience. If default privacy settings meet the
82 criteria specified under this subdivision, the default privacy settings shall not be considered a dark pattern.

83 **§ 59.1-605. Data protection impact assessments.**

84 A. An operator shall include all of the following information in a data protection impact assessment
85 required under subdivision 1 of § 59.1-604:

86 1. The purpose of an online service, product, or feature provided by the operator;
87 2. The manner in which the online service, product, or feature uses a child's personal data; and
88 3. A determination as to whether the online service, product, or feature is designed and offered in
89 a manner consistent with the best interests of a child who is reasonably likely to access the online service,
90 product, or feature. In making such determination, the operator shall include all of the following
91 information:

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

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

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

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

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

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

108 D. A data protection impact assessment conducted by an operator for the purpose of compliance
109 with any other law of the Commonwealth shall be deemed to comply with the requirements of this chapter.

110 **§ 59.1-606. Prohibition on certain actions by operators.**

111 No operator that provides an online service, product, or feature reasonably likely to be accessed
112 by a child shall:

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

117 2. Profile a child by default if the profiling has been identified as high risk to the child on the basis
118 of a data protection impact assessment required under subdivision 1 of § 59.1-604 unless the high risk has
119 been suitably mitigated through measures identified in the data protection impact assessment. If the
120 operator profiles by default, there shall be a presumption that the profiling does not violate this subdivision
121 if (i) the operator can demonstrate that the operator has appropriate safeguards in place to protect a child;
122 (ii) the profiling is necessary to provide the online service, product, or feature requested and only used
123 regarding the aspects of the online service, product, or feature with which a child is actively and knowingly
124 engaged; and (iii) the profiling enhances a child's experience on an online service, product, or feature and
125 the operator offers settings to control the use of the child's data for the purpose of enhancing the child's
126 experience.

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

131 4. If the end user is a child, use personal data for any reason other than a reason for which that
132 personal data was collected, unless the operator can demonstrate a compelling reason that use of the
133 personal data is in the best interests of a child.

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

138 6. Track the precise geolocation data of a child without providing notice regarding the tracking of
139 the child's precise geolocation data.

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

144 **§ 59.1-607. Enforcement; civil penalties; expenses.**

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

146 B. Whenever the Attorney General has reasonable cause to believe that any person has engaged
147 in, is engaging in, or is about to engage in any violation of this chapter, the Attorney General is empowered
148 to issue a civil investigative demand. The provisions of § 59.1-9.10 shall apply mutatis mutandis to civil
149 investigative demands issued under this section.

150 C. Prior to initiating any action under this chapter, the Attorney General shall provide an operator
151 90 days' written notice identifying the specific provisions of this chapter the Attorney General alleges
152 have been or are being violated. If within the 90-day period the operator cures the noticed violation and
153 provides the Attorney General an express written statement that the alleged violations have been cured
154 and that no further violations shall occur, no action shall be initiated against the operator.

155 D. If an operator continues to violate this chapter following the cure period in subsection C or
156 breaches an express written statement provided to the Attorney General under that subsection, the
157 Attorney General may initiate an action in the name of the Commonwealth and may seek an injunction to
158 restrain any violations of this chapter and civil penalties of no more than \$2,500 per affected child for
159 each violation or no more than \$7,500 per affected child for each willful violation under this chapter. All
160 civil penalties, expenses, and attorney fees collected pursuant to this chapter shall be paid into the state

161 treasury and credited to the Regulatory, Consumer Advocacy, Litigation, and Enforcement Revolving
162 Trust Fund.

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

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

167 G. Compliance by an operator with the federal Children's Online Privacy Protection Act, 15 U.S.C.
168 § 6501 et seq., shall constitute compliance with this chapter for a child younger than 13 years of age.

169 #