

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 901
Economic Matters

(Delegates Solomon and Wilson)

Finance

Consumer Protection - Online Products and Services - Children's Data

This bill requires a business that offers an online product likely to be accessed by children to complete a “data protection impact assessment” of the online product. The bill establishes numerous rules, procedures, and prohibitions related to the assessments. Generally, the requirement to complete an assessment applies to an online product offered to the public on or after April 1, 2025. A business that violates the bill’s requirements is subject to a civil penalty of up to (1) \$2,500 per affected child for each negligent violation and (2) \$7,500 per affected child for each intentional violation. Nothing in the bill may be interpreted to provide a private right of action under the bill or any other law. A data protection impact assessment is protected as confidential and must be exempt from public disclosure, including under the Maryland Public Information Act. Violation of the bill is an unfair, abusive, or deceptive trade practice under the Maryland Consumer Protection Act (MCPA), and subject to MCPA’s civil and criminal penalty provisions. However, a violator is not subject to specified MCPA penalty provisions related to merchants.

Fiscal Summary

State Effect: The bill’s imposition of existing penalty provisions does not have a material impact on State finances or operations. The Office of the Attorney General (OAG), Consumer Protection Division, can handle the bill’s requirements with existing resources.

Local Effect: The bill’s imposition of existing penalty provisions does not have a material impact on local government finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Definitions

A “business” is a sole proprietorship, limited liability company, corporation, association, or other legal entity that:

- is organized or operated for the profit or financial benefit of its shareholders or other owners;
- collects consumers’ personal information, or on the behalf of which another collects consumers’ personal information;
- alone, or jointly with its affiliates or subsidiaries, determines the purposes and means of the processing of consumers’ personal information;
- does business in the State; and
- satisfies at least one of the following criteria: (1) has annual gross revenues of \$25.0 million or more, periodically adjusted for inflation; (2) annually buys, receives, sells, or shares the personal information of 50,000 or more consumers, households, or devices, alone or in combination with its affiliates or subsidiaries (and for the business’s commercial purposes); or (3) derives at least 50% of its annual revenues from the sale of consumers’ personal information.

“Data protection impact assessment” (or “assessment”) means a systematic survey to assess and mitigate risks to children who are reasonably likely to access the online product at issue that arise from the data management practices of the business and the provision of the online product.

“Online product” means an online service, product, or feature.

Applicability

The bill specifies entities and information to which its requirements do not apply. For example, the bill does not apply to health information and health providers (or other covered entities) already governed by specified federal regulations and laws. Certain information collected as part of a clinical trial is also not subject to the bill’s requirements.

Determination of Best Interests of Children

When determining whether an action is in the best interests of children, a business must consider children’s (1) privacy; (2) safety; (3) physical health; and (4) mental health.

Data Protection Impact Assessment

This bill requires a business that provides an online product likely to be accessed by children to prepare a data protection impact assessment for the online product. The data protection impact assessment must:

- identify the purpose of the online product;
- identify how the online product uses children’s personal information;
- identify the risks of material detriment to children that arise from the data management practices of the business; and
- address, to the extent applicable, specified factors (*e.g.*, whether algorithms used by the online product could result in harm to children, etc.).

A data protection impact assessment prepared by a business for the purpose of compliance with any other law complies with the bill if the assessment meets the bill’s requirements. A single data protection impact assessment may address a set of similar processing operations that present similar risks provided no individual risks are minimized.

A business must complete a data protection impact assessment by April 1, 2025, for any online product offered to the public that is likely to be accessed by children before that date.

A business that provides an online product likely to be accessed by children may not offer the product to the public before completing a data protection impact assessment.

The bill establishes rules and procedures related to a data protection impact assessment. Among other requirements, a business completing a data protection impact assessment must:

- maintain documentation of the assessment for as long as the online product is likely to be accessed by children;
- review each assessment every two years;
- create a plan to mitigate or eliminate the risk of material detriment before the online product is made available to children; and
- provide prominent, accessible, and responsive tools to help children or their parents or guardians (if applicable) exercise their privacy rights and report concerns.

Prohibitions

The bill also establishes a number of prohibitions for a business that provides an online product likely to be accessed by children. For example, the business may not:

- use the personal information of a child in a way that the business knows, or has reason to know, is materially detrimental to the physical health, mental health, or well-being of a child;
- profile a child by default, with limited exceptions; or
- collect, sell, share, or retain any personal information that is unnecessary to provide an online product that a child is actively and knowingly engaged with (unless the business can demonstrate a compelling reason that doing so is in the best interests of children likely to access the online product).

Written Requests from the Office of the Attorney General

Within three business days after receiving a written request from OAG, a business that provides an online product likely to be accessed by children must provide OAG with a list of all data protection impact assessments completed pursuant to the bill's requirements.

Within five business days after receiving the written request, the business must provide OAG any data protection impact assessment completed. However, to the extent that the disclosure includes information subject to attorney-client privilege or work product protection, the disclosure may not constitute a waiver of that privilege or protection.

Enforcement Provisions

All fines, penalties, and expenses collected, as specified, must be paid into the general fund with the intent that they be used to fully offset any costs incurred by OAG in connection with enforcing the bill.

If a business is in substantial compliance with the bill's requirements, OAG must provide written notice before filing an action authorized by the bill. Notice must identify the specific provisions of the bill that OAG alleges have been (or are being) violated.

A business may not be liable for a civil penalty for any violation for which notice is given if the business:

- cures any violation specified in the notice from OAG within 90 days;
- provides OAG with a written statement that the alleged violations have been cured; and
- takes measures to prevent future violations that OAG agrees to be sufficient.

Current Law: Although the Commercial Law Article does not specifically regulate online products likely to be accessed by children, the Maryland Personal Information Protection Act imposes certain duties on a business to protect an individual's personal information. A

business in possession of personal information must implement and maintain reasonable security procedures and practices to protect the information from unauthorized access, use, modification, or disclosure.

If a data breach occurs, the business must conduct, in good faith, a reasonable and prompt investigation to determine the likelihood that personal information of the individual has been (or will be) misused. If the business determines that personal information likely has been (or will be) misused, the owner or licensee of the computerized data must notify an affected individual as soon as practicable, but not later than 45 days after the business discovers or is notified of the breach. For a business that only maintains personal data, the business must notify the owner or licensee of the breach as soon as practicable but not later than 10 days after the business discovers or is notified of the breach. Notification may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation or jeopardize homeland or national security.

Maryland Consumer Protection Act

An unfair, abusive, or deceptive trade practice under MCPA includes, among other acts, any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. The prohibition against engaging in any unfair, abusive, or deceptive trade practice encompasses the offer for or actual sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; the collection of consumer debt; or the offer for or actual purchase of consumer goods or consumer realty from a consumer by a merchant whose business includes paying off consumer debt in connection with the purchase of any consumer goods or consumer realty from a consumer.

The Consumer Protection Division is responsible for enforcing MCPA and investigating the complaints of aggrieved consumers. The division may attempt to conciliate the matter, issue a cease and desist order, or file a civil action in court. A merchant who violates MCPA is subject to a fine of up to \$10,000 for each violation and up to \$25,000 for each repetition of the same violation. In addition to any civil penalties that may be imposed, any person who violates MCPA is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000 and/or imprisonment for up to one year.

Small Business Effect: The bill establishes numerous requirements for businesses that offer online products likely to be accessed by children. While the Department of Legislative Services assumes that most entities affected by the bill are likely not small businesses, any small businesses that do meet the bill's criteria as a "business" must conduct the assessments required by the bill and may incur costs to do so.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: SB 844 (Senators Kramer and West) - Finance.

Information Source(s): Judiciary (Administrative Office of the Courts); Department of Legislative Services

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