

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 571

(Senator Kramer, *et al.*)

Finance

Economic Matters

Consumer Protection – Online Products and Services – Data of Children
(Maryland Kids Code)

This bill requires a “covered entity” that provides an online product reasonably 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. A covered entity 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. 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: General fund expenditures likely increase, at least minimally, for the Office of the Attorney General (OAG), Consumer Protection Division beginning in FY 2025, as discussed below. Potential general fund revenues from civil penalties.

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 “covered entity” 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 data, or uses another entity to collect consumers’ personal data on its behalf;
- 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 covered entity’s commercial purposes); or (3) derives at least 50% of its annual revenues from the sale of consumers’ personal data.

“Data protection impact assessment” (or “assessment”) means a systematic survey to assess compliance with the duty to act in the best interests of children.

“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 data subject to certain federal laws and regulations, as specified. Certain information collected as part of a clinical trial is also not subject to the bill’s requirements.

Data Protection Impact Assessment

The bill requires a covered entity that provides an online product likely to be accessed by children to prepare a data protection impact assessment for the online product that meets specified requirements. The data protection impact assessment must, for example:

- identify the purpose of the online product;
- identify how the online product uses children’s data; and
- determine whether the online product is designed in a manner consistent with the best interests of children reasonably likely to access the online product through consideration of specified factors (*e.g.*, whether algorithms used by the online product would result in reasonably foreseeable and material physical or financial harm to children, etc.).

A data protection impact assessment prepared by a covered entity for the purpose of compliance with any other law complies with the bill if the assessment meets the specified requirements. A single data protection impact assessment may contain multiple similar processing operations that present similar risks only if each relevant online product is addressed.

A covered entity must complete a data protection impact assessment by April 1, 2026, for any online product offered to the public that (1) is reasonably likely to be accessed by children before that date; (2) is offered to the public on or before that date; and (3) will continue to be offered to the public after July 1, 2026. For products initially offered after April 1, 2026, a covered entity must complete an assessment.

The bill establishes rules and procedures related to a data protection impact assessment. Among other requirements, a covered entity 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 as necessary to account for material changes to processing pertaining to the online product within 90 days of such material changes;
- regardless of any other law, configure all default privacy settings provided to children by the online product to offer a high level of privacy, unless the covered entity can demonstrate a compelling reason that a different setting is in the best interests of children;
- provide any privacy information, terms of service, policies, and community standards concisely, prominently, and using clear language suited to the age of children likely to access the online product; 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 covered entity that provides an online product that is accessed or reasonably likely to be accessed by children. For example, the covered entity may not:

- process the personal data of a child in a way that is inconsistent with the best interests of children reasonably likely to access the online product;
- profile a child by default, with limited exceptions; or
- process personal data of a child that is not reasonably necessary to provide an online product with which the child is actively and knowingly engaged.

Authorized Monitoring Practices for Parents or Guardians

A covered entity that provides an online product that is accessed or reasonably likely to be accessed by children may allow a child's parent or guardian to monitor the child's online activity or track the child's location, without providing an obvious signal to the child when the child is being monitored or tracked.

Written Requests from the Office of the Attorney General

Within five business days after receiving a written request from OAG, a covered entity that provides an online product reasonably 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 seven business days after receiving the written request, a covered entity must provide OAG any data protection impact assessment completed. OAG may extend the time allowed for a covered entity to provide the required information. 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 covered entity 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 covered entity may not be liable for a civil penalty for any violation for which notice is given if the covered entity meets certain requirements (*i.e.*, has completed a data impact assessment as required; cures a 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.)

Nothing in the bill may be interpreted to:

- provide a private right of action under the bill or any other law;
- impose liability in a manner that is inconsistent with federal law;
- prevent or preclude a child from deliberately or independently searching for (or specifically requesting) content; or
- require a covered entity to implement an age-gating requirement.

Wherever possible, law relating to consumers' personal data should be construed to harmonize with the provisions of the bill. In the event of a conflict between other laws and the bill, the provisions of the law that afford the greatest protection for the right of privacy for consumers must control.

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 that 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.

State Fiscal Effect: General fund expenditures likely increase, at least minimally, for OAG to handle enforcement under the bill. OAG advises that it may require as many as three additional positions (one full-time assistant Attorney General, one investigator, and one mediation supervisor) with corresponding general fund expenditures of up to \$355,700 in fiscal 2025 and \$469,000 by fiscal 2029.

However, the Department of Legislative Services (DLS) advises that the extent of resources potentially needed by OAG is dependent on the number of complaints filed under the bill and the level of effort involved in each case. While generally acknowledging that expenditures likely increase at least minimally for enforcement efforts, without experience under the bill, the need for additional staff is unclear. To the extent that additional staffing resources are required, OAG may request them through the annual budget process.

While the bill requires OAG to pay all fines, penalties, and expenses collected into the general fund (with the intent that they be used to fully offset any costs incurred), OAG advises that revenues received pursuant to this requirement may be minimal because (1) an entity that cures a violation after receiving notice from OAG is not subject to penalties and (2) the penalty structure established by the bill includes penalties that may, in practice, be less than what could otherwise be collected under MCPA.

Small Business Effect: The bill establishes numerous requirements for covered entities that offer online products likely to be accessed by children. While DLS 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 "covered entity" must conduct the assessments required by the bill and may incur costs to do so.

Additional Information

Recent Prior Introductions: Similar legislation has been introduced within the last three years. See HB 901 and SB 844 of 2023.

Designated Cross File: HB 603 (Delegate Solomon, *et al.*) - Economic Matters.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Judiciary (Administrative Office of the Courts); Department of Legislative Services

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