AMENDMENT NO._______  Calendar No._______

Purpose: In the nature of a substitute.


S.1418

To amend the Children’s Online Privacy Protection Act of 1998 to strengthen protections relating to the online collection, use, disclosure, and deletion of personal information of children and teens, and for other purposes.

Referred to the Committee on ________________ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by Mr. MARKEY

Viz:

1 Strike all after the enacting clause and insert the fol-

2 lowing:

3 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

4 (a) Short Title.—This Act may be cited as the

5 “Children and Teens’ Online Privacy Protection Act”.

6 (b) Table of Contents.—The table of contents for

7 this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Online collection, use, disclosure, and deletion of personal information
   of children and teens.
Sec. 3. Study and reports of mobile and online application oversight and en-
   forcement.
Sec. 4. GAO study.
SEC. 2. ONLINE COLLECTION, USE, DISCLOSURE, AND DELETION OF PERSONAL INFORMATION OF CHILDREN AND TEENS.

(a) DEFINITIONS.—Section 1302 of the Children’s Online Privacy Protection Act of 1998 (15 U.S.C. 6501) is amended—

(1) by amending paragraph (2) to read as follows:

“(2) OPERATOR.—The term ‘operator’—

“(A) means any person—

“(i) who, for commercial purposes, in interstate or foreign commerce operates or provides a website on the internet, an online service, an online application, or a mobile application; and

“(ii) who—

“(I) collects or maintains, either directly or through a service provider, personal information from or about the users of that website, service, or application;

“(II) allows another person to collect personal information directly from users of that website, service, or application (in which case, the oper-
ator is deemed to have collected the
information); or

“(III) allows users of that
website, service, or application to pub-
licly disclose personal information (in
which case, the operator is deemed to
have collected the information); and

“(B) does not include any nonprofit entity
that would otherwise be exempt from coverage
under section 5 of the Federal Trade Commis-
sion Act (15 U.S.C. 45).”; (2) in paragraph (4)—

(A) by amending subparagraph (A) to read
as follows:

“(A) the release of personal information
collected from a child or teen for any purpose,
except where the personal information is pro-
vided to a person other than an operator who—

“(i) provides support for the internal
operations of the website, online service,
online application, or mobile application of
the operator, excluding any activity relating
to individual-specific advertising to
children or teens; and
“(ii) does not disclose or use that personal information for any other purpose; and”;
(B) in subparagraph (B)—
(i) by inserting “or teen” after “child” each place the term appears; and
(ii) by striking “website or online service” and inserting “website, online service, online application, or mobile application”;
(3) by striking paragraph (8) and inserting the following:
“‘(A) PERSONAL INFORMATION.—
‘(i) IN GENERAL.—The term “personal information” means individually identifiable information about an individual collected online, including—
‘‘(ii) a first and last name;
‘‘(iii) a home or other physical address including street name and name of a city or town;
‘‘(iv) an e-mail address;
‘‘(v) a telephone number;
‘‘(vi) a Social Security number;
"(vii) any other identifier that the Commission determines permits the physical or online contacting of a specific individual;

"(viii) geolocation information;

"(ix) information generated from the measurement or technological processing of an individual's biological, physical, or physiological characteristics that is used to identify an individual, including—

"(I) fingerprints;

"(II) voice prints;

"(III) iris or retina imagery scans;

"(IV) facial templates;

"(V) deoxyribonucleic acid (DNA) information; or

"(VI) gait;

"(x) information linked or reasonably linkable to a child or teen; or

"(xi) information linked or reasonably linkable to a child or teen or the parents of that child or teen (including any unique identifier) that an operator collects online from the child or teen and combines with
an identifier described in this subpara-
graph.

“(B) EXCLUSION.—The term ‘personal in-
formation’ shall not include an audio file that
contains a child’s or teen’s voice so long as the
operator—

“(i) does not request information via
voice that would otherwise be considered
personal information under this paragraph;

“(ii) provides clear notice of its collect-
ion and use of the audio file and its dele-
tion policy in its privacy policy;

“(iii) only uses the voice within the
audio file solely as a replacement for writ-
ten words, to perform a task, or engage
with a website, online service, online appli-
cation, or mobile application, such as to
perform a search or fulfill a verbal instruc-
tion or request; and

“(iv) only maintains the audio file
long enough to complete the stated purpose
and then immediately deletes the audio file
and does not make any other use of the
audio file prior to deletion.”;
(4) by amending paragraph (9) to read as follows:

"(9) Verifiable consent.—The term 'verifiable consent' means any reasonable effort (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to ensure that, in the case of a child, a parent of the child, or, in the case of a teen, the teen—

"(A) receives specific notice of the personal information collection, use, and disclosure practices of the operator; and

"(B) before the personal information of the child or teen is collected, freely and unambiguously authorizes—

"(i) the collection, use, and disclosure, as applicable, of that personal information; and

"(ii) any subsequent use of that personal information."

(5) in paragraph (10)—

(A) in the paragraph header, by striking "WEBSITE OR ONLINE SERVICE DIRECTED TO CHILDREN" and inserting "WEBSITE, ONLINE
SERVICE, ONLINE APPLICATION, OR MOBILE APPLICATION DIRECTED TO CHILDREN’;

(B) by striking “website or online service” each place it appears and inserting “website, online service, online application, or mobile application”; and

(C) by adding at the end the following new subparagraph:

“(C) RULE OF CONSTRUCTION.—In considering whether a website, online service, online application, or mobile application is directed to children, the Commission shall, using competent and reliable empirical evidence, apply a totality of circumstances test to consider the intended audience of the website, online service, online application, or mobile application, as a whole.”; and

(6) by adding at the end the following:

“(13) CONNECTED DEVICE.—The term ‘connected device’ means a device that is capable of connecting to the internet, directly or indirectly, or to another connected device.

“(14) ONLINE APPLICATION.—The term ‘online application’—
“(A) means an internet-connected software program; and

“(B) includes a service or application offered via a connected device.

“(15) MOBILE APPLICATION.—The term ‘mobile application’—

“(A) means a software program that runs on the operating system of—

“(i) a cellular telephone;

“(ii) a tablet computer; or

“(iii) a similar portable computing device that transmits data over a wireless connection; and

“(B) includes a service or application offered via a connected device.

“(16) GEOLOCATION INFORMATION.—The term ‘geolocation information’ means information sufficient to identify a street name and name of a city or town.

“(17) TEEN.—The term ‘teen’ means an individual over the age of 12 and under the age of 17.

“(18) INDIVIDUAL-SPECIFIC ADVERTISING TO CHILDREN OR TEENS.—

“(A) IN GENERAL.—The term ‘individual-specific advertising to children or teens’ means
advertising or any other effort to market a product or service that is directed to a specific child or teen or a device that is linked or reasonably linkable to a child or teen—

“(i) based on—

“(I) the personal information of—

“(aa) the child or teen; or

“(bb) a group of children or teens who are similar in sex, age, income level, race, or ethnicity to the specific child or teen to whom the product or service is marketed;

“(II) psychological profiling of a child or teen or group of children or teens; or

“(III) a unique identifier of the device; or

“(ii) as a result of use by the child or teen, access by any device of the child or teen, or use by a group of children or teens who are similar to the specific child or teen, of more than a single—

“(I) website;
"(II) online service;

"(III) online application;

"(IV) mobile application; or

"(V) connected device.

"(B) Exclusions.—The term ‘individual-specific advertising to children or teens’ shall not include—

"(i) advertising or marketing to an individual or the device of an individual in response to the individual’s specific request for information or feedback, such as a child’s or teen’s current search query;

"(ii) contextual advertising, such as when an advertisement is displayed based on the content of the website, online service, online application, mobile application, or connected device in which the advertisement appears and does not vary based on personal information related to the viewer; or

"(iii) processing personal information solely for measuring or reporting advertising or content performance, reach, or frequency, including independent measurement.
“(C) Rule of Construction.—Nothing in subparagraph (A) shall be construed to pro-
hibit an operator with actual knowledge or
knowledge fairly implied on the basis of objec-
tive circumstances that an individual is under
the age of 17 from delivering advertising or
marketing that is age-appropriate and intended
for a child or teen audience, so long as the op-
erator does not use any personal information
other than whether the user is under the age of
17.”.

(b) Online Collection, Use, Disclosure, and
Deletion of Personal Information of Children
and Teens.—Section 1303 of the Children’s Online Pri-
vacy Protection Act of 1998 (15 U.S.C. 6502) is amend-
ed—

(1) by striking the heading and inserting the
following: “ONLINE COLLECTION, USE, DISCLOS-
URE, AND DELETION OF PERSONAL INFORMA-
TION OF CHILDREN AND TEENS.”;

(2) in subsection (a)—

(A) by amending paragraph (1) to read as
follows:

“(1) In General.—It is unlawful for an oper-
ator of a website, online service, online application,
or mobile application directed to children or for any
operator of a website, online service, online applica-
tion, or mobile application with actual knowledge or
knowledge fairly implied on the basis of objective cir-
cumstances—

“(A) to collect personal information from a
child or teen in a manner that violates the regu-
lations prescribed under subsection (b);

“(B) to collect, use, disclose to third par-
ties, or compile personal information of a child
or teen for purposes of individual-specific adver-
tising to children or teens (or to allow another
person to collect, use, disclose, or compile such
information for such purpose);

“(C) to collect the personal information of
a child or teen except when the collection of the
personal information is—

“(i) consistent with the context of a
particular or service or the relationship of
the child or teen with the operator, includ-
ing collection necessary to fulfill a trans-
action or provide a product or service re-
quested by the child or teen; or

“(ii) required or specifically author-
zied by Federal or State law; or
“(D) to retain the personal information of a child or teen for longer than is reasonably necessary to fulfill a transaction or provide a service requested by the child or teen except as required or specifically authorized by Federal or State law.”; and

(B) in paragraph (2)—

(i) by striking “Notwithstanding paragraph (1)” and inserting “Notwithstanding paragraph (1)(A)”;

(ii) by striking “of such a website or online service”; and

(iii) by striking “subsection (b)(1)(B)(iii) to the parent of a child” and inserting “subsection (b)(1)(B)(iii) to the parent of a child or under subsection (b)(1)(C)(iii) to a teen”;  

(3) in subsection (b)—

(A) in paragraph (1)—

(i) in subparagraph (A)—

(I) by striking “operator of any website” and all that follows through “from a child” and inserting “operator of a website, online service, online application, or mobile application
directed to children or that has actual
knowledge or knowledge fairly implied
on the basis of objective circumstances
that it is collecting personal inform-
ation from children or teens’;

(II) in clause (i)—

(aa) by striking “notice on
the website” and inserting “clear
and conspicuous notice”;

(bb) by inserting “or teens”
after “children”;

(cc) by striking “, and the
operator’s” and inserting “, the
operator’s”; and

(dd) by striking “; and” and
inserting “, the rights and oppor-
tunities available to the parent of
the child or teen under subpara-
graphs (B) and (C), and the pro-
cedures or mechanisms the oper-
ator uses to ensure that personal
information is not collected from
children or teens except in ac-
cordance with the regulations
promulgated under this paragraph;”;

(III) in clause (ii)—

(aa) by striking “parental”;

(bb) by inserting “or teens” after “children”;

(cc) by striking the semi-colon at the end and inserting “; and”; and

(IV) by inserting after clause (ii) the following new clause:

“(iii) to obtain verifiable consent from a parent of a child or a teen before using or disclosing personal information of the child or teen for any purpose that is a material change from the original purposes and disclosure practices specified to the parent of the child or the teen under clause (i);”;

(ii) in subparagraph (B)—

(I) in the matter preceding clause (i), by striking “website or online service” and inserting “operator”; 

(II) in clause (i), by inserting “and the method by which the oper-
ator obtained the personal information, and the purposes for which the operator collects, uses, discloses, and retains the personal information” before the semicolon;

(III) in clause (ii)—

(aa) by inserting “to delete personal information collected from the child or content or information submitted by the child to a website, online service, online application, or mobile application and” after “the opportunity at any time”; and

(bb) by striking “; and” and inserting a semicolon;

(IV) by redesignating clause (iii) as clause (iv) and inserting after clause (ii) the following new clause:

“(iii) the opportunity to challenge the accuracy of the personal information and, if the parent of the child establishes the inaccuracy of the personal information, to have the inaccurate personal information corrected;”; and
(V) in clause (iv), as so redesignated, by inserting "; if such information is available to the operator at the time the parent makes the request"
before the semicolon;

(iii) by redesignating subparagraphs 
(C) and (D) as subparagraphs (D) and 
(E), respectively;

(iv) by inserting after subparagraph 
(B) the following new subparagraph:

"(C) require the operator to provide, upon the request of a teen under this subparagraph who has provided personal information to the operator, upon proper identification of that teen—

"(i) a description of the specific types of personal information collected from the teen by the operator, the method by which the operator obtained the personal information, and the purposes for which the operator collects, uses, discloses, and retains the personal information;

"(ii) the opportunity at any time to delete personal information collected from the teen or content or information sub-
mitted by the teen to a website, online
service, online application, or mobile appli-
cation and to refuse further use or collect-
ion of personal information from the teen;

“(iii) the opportunity to challenge the
accuracy of the personal information and,
if the parent of the child establishes the in-
accuracy of the personal information, to
have the inaccurate personal information
corrected; and

“(iv) a means that is reasonable
under the circumstances for the teen to ob-
tain any personal information collected
from the teen, if such information is avail-
able to the operator at the time the teen
makes the request;”; and

(v) by amending subparagraph (E), as
so redesignated, to read as follows:

“(E) require the operator to establish, im-
plement, and maintain reasonable security prac-
tices to protect the confidentiality, integrity,
and accessibility of personal information of chil-
dren or teens collected by the operator, and to
protect such personal information against unau-
thorized access.”;
(B) in paragraph (2)—

(i) in the matter preceding subparagraph (A), by striking “verifiable parental consent” and inserting “verifiable consent”;

(ii) in subparagraph (A)—

(I) by inserting “or teen” after “collected from a child”;

(II) by inserting “or teen” after “request from the child”; and

(III) by inserting “or teen or to contact another child or teen” after “to recontact the child”;

(iii) in subparagraph (B)—

(I) by striking “parent or child” and inserting “parent or teen”; and

(II) by striking “parental consent” each place the term appears and inserting “verifiable consent”;

(iv) in subparagraph (C)—

(I) in the matter preceding clause (i), by inserting “or teen” after “child” each place the term appears;

(II) in clause (i)—
(aa) by inserting "or teen"
after "child" each place the term
appears; and

(bb) by inserting "or teen, 
as applicable," after "parent"
each place the term appears; and

(III) in clause (ii), by inserting
"or teen" after "child" each place the
term appears; and

(v) in subparagraph (D)—

(I) in the matter preceding clause
(i), by inserting "or teen" after
"child" each place the term appears;

(II) in clause (ii), by inserting
"or teen" after "child"; and

(III) in the flush text following
clause (iii)—

(aa) by inserting "or teen, 
as applicable," after "parent"
each place the term appears; and

(bb) by inserting "or teen"
after "child"; and

(C) by adding after paragraph (3) the fol-
lowing:
“(4) CONTINUATION OF SERVICE.—The regulations shall prohibit an operator from discontinuing service provided to a child or teen on the basis of a request by the parent of the child or by the teen, under the regulations prescribed under subparagraph (B) or (C) of paragraph (1), respectively, to delete personal information collected from the child or teen, to the extent that the operator is capable of providing such service without such information.

“(5) RULE OF CONSTRUCTION.—A request made pursuant to subparagraph (B) or (C) of paragraph (1) to delete personal information of a child or teen shall not be construed—

“(A) to limit the authority of a law enforcement agency to obtain any content or information from an operator pursuant to a lawfully executed warrant or an order of a court of competent jurisdiction;

“(B) to require an operator or third party delete information that—

“(i) any other provision of Federal or State law requires the operator or third party to maintain; or

“(ii) was submitted to the website, online service, online application, or mobile
application of the operator by any person other than the user who is attempting to erase or otherwise eliminate the content or information, including content or information submitted by the user that was republished or resubmitted by another person.

and

(4) in subsection (e), by striking “a regulation prescribed under subsection (a)” and inserting “subparagraph (B), (C), or (D) of subsection (a)(1), or a of a regulation prescribed under subparagraph (A) of such subsection,”.

(c) SAFE HARBORS.—Section 1304 of the Children’s Online Privacy Protection Act of 1998 (15 U.S.C. 6503) is amended—

(1) in subsection (b)(1), by inserting “and teens” after “children”; and

(2) by adding at the end the following:

“(d) PUBLICATION.—

“(1) IN GENERAL.—The Commission shall publish on the internet website of the Commission any report or documentation required by regulation to be submitted to the Commission to carry out this section.
“(2) Restrictions on publication.—The restrictions described in subsection (f) of section 6 of the Federal Trade Commission Act (15 U.S.C. 46(f)) applicable to the publication of information obtained by the Commission through investigations conducted under such section shall apply in same manner to the publication under this subsection of information obtained by the Commission from a report or documentation described in paragraph (1).”.

(d) Administration and applicability of Act.—

Section 1306 of the Children's Online Privacy Protection Act of 1998 (15 U.S.C. 6505) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by striking “, in the case of” and all that follows through “the Board of Directors of the Federal Deposit Insurance Corporation;” and inserting the following: “by the appropriate Federal banking agency, with respect to any insured depository institution (as those terms are defined in section 3 of that Act (12 U.S.C. 1813));” and

(B) by striking paragraph (2) and redesignating paragraphs (3) through (6) as paragraphs (2) through (5), respectively; and
(2) by adding at the end the following new subsections:

“(f) DETERMINATION OF WHETHER AN OPERATOR HAS KNOWLEDGE FAIRLY IMPLIED ON THE BASIS OF OBJECTIVE CIRCUMSTANCES.—

“(1) RULE OF CONSTRUCTION.—For purposes of enforcing this Act or a regulation promulgated under this Act, in making a determination as to whether an operator has knowledge fairly implied on the basis of objective circumstances that a user is a child or teen, the Commission shall rely on competent and reliable empirical evidence, taking into account the totality of the circumstances, including consideration of whether the operator, using available technology, exercised reasonable care.

“(2) PROTECTIONS FOR PRIVACY.—Nothing in the Commission’s determination under paragraph (1) shall be construed to require an operator to—

“(A) affirmatively collect any personal information with respect to the age of a child or teen that an operator is not already collecting in the normal course of business; or

“(B) implement an age gating or age verification functionality.

“(3) COMMISSION GUIDANCE.—
“(A) IN GENERAL.—Within 180 days of enactment, the Commission shall issue guidance to provide information, including best practices and examples for operators to understand the Commission’s determination of whether an operator has knowledge fairly implied on the basis of objective circumstances.

“(B) LIMITATION.—No guidance issued by the Commission with respect to this Act shall confer any rights on any person, State, or locality, nor shall operate to bind the Commission or any person to the approach recommended in such guidance. In any enforcement action brought pursuant to this Act, the Commission shall allege a specific violation of a provision of this Act. The Commission may not base an enforcement action on, or execute a consent order based on, practices that are alleged to be inconsistent with any such guidance, unless the practices allegedly violate this Act.

“(g) ADDITIONAL REQUIREMENT.—Any regulations issued under this Act shall include a description and analysis of the impact of proposed and final Rules on small entities per the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.).”
SEC. 3. STUDY AND REPORTS OF MOBILE AND ONLINE APPLICATION OVERSIGHT AND ENFORCEMENT.

(a) OVERSIGHT REPORT.—Not later than 3 years after the date of enactment of this Act, the Federal Trade Commission shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives a report on the processes of platforms that offer mobile and online applications for ensuring that, of those applications that are websites, online services, online applications, or mobile applications directed to children, the applications operate in accordance with—

(1) this Act, the amendments made by this Act, and rules promulgated under this Act; and

(2) rules promulgated by the Commission under section 5 of the Federal Trade Commission Act (15 U.S.C. 45) relating to unfair or deceptive acts or practices in marketing.

(b) ENFORCEMENT REPORT.—Not later than 1 year after the date of enactment of this Act, and each year thereafter, the Federal Trade Commission shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives a report that ad-
(1) the number of actions brought by the Commission during the reporting year to enforce the Children’s Online Privacy Protection Act of 1998 (15 U.S.C. 6501) (referred to in this subsection as the “Act”) and the outcome of each such action;

(2) the total number of investigations or inquiries into potential violations of the Act; during the reporting year;

(3) the total number of open investigations or inquiries into potential violations of the Act as of the time the report is submitted;

(4) the number and nature of complaints received by the Commission relating to an allegation of a violation of the Act during the reporting year; and

(5) policy or legislative recommendations to strengthen online protections for children and teens.

SEC. 4. GAO STUDY.

(a) STUDY.—The Comptroller General of the United States (in this section referred to as the “Comptroller General”) shall conduct a study on the privacy of teens who use financial technology products. Such study shall—

(1) identify the type of financial technology products that teens are using;
(2) identify the potential risks to teens’ privacy from using such financial technology products; and

(3) determine whether existing laws are sufficient to address such risks to teens’ privacy.

(b) REPORT.—Not later than 1 year after the date of enactment of this section, the Comptroller General shall submit to Congress a report containing the results of the study conducted under subsection (a), together with recommendations for such legislation and administrative action as the Comptroller General determines appropriate.