

HB1270_L.003

HOUSE COMMITTEE OF REFERENCE AMENDMENT

Committee on Agriculture, Water & Natural Resources.

HB26-1270 be amended as follows:

1 Amend printed bill, page 5, strike lines 12 and 13.

2 Renumber succeeding subsections accordingly.

3 Page 6, after line 16 insert:

4 "(7) "FIDUCIARY" MEANS A DATA SERVICE PROVIDER THAT
5 COLLECTS, HOLDS, PROCESSES, TRANSFORMS, AGGREGATES, ANALYZES,
6 SELLS, LICENSES, OR OTHERWISE COMMERCIALIZES RAW AGRICULTURAL
7 DATA OR TRANSFORMED AGRICULTURAL DATA ON BEHALF OF AN
8 AGRICULTURAL PRODUCER OR DATA OWNER, AND THAT BY VIRTUE OF
9 THAT RELATIONSHIP HAS A FIDUCIARY DUTY TO THE AGRICULTURAL
10 PRODUCER OR DATA OWNER.

11 (8) "FIDUCIARY DUTY" MEANS THE OBLIGATION OF A FIDUCIARY
12 TO ACT AT ALL TIMES IN THE BEST INTERESTS OF THE AGRICULTURAL
13 PRODUCER OR DATA OWNER WHOSE DATA THE FIDUCIARY COLLECTS,
14 HOLDS, PROCESSES, TRANSFORMS, AGGREGATES, ANALYZES, SELLS,
15 LICENSES, OR OTHERWISE COMMERCIALIZES AND INCLUDES THE
16 FOLLOWING OBLIGATIONS:

17 (a) THE DUTY OF LOYALTY, WHICH REQUIRES THE FIDUCIARY TO
18 SUBORDINATE THE FIDUCIARY'S OWN INTEREST TO THOSE OF THE
19 AGRICULTURAL PRODUCER OR DATA OWNER IN ALL MATTERS RELATED TO
20 THE RAW AGRICULTURAL DATA OR TRANSFORMED AGRICULTURAL DATA;

21 (b) THE DUTY OF CARE, WHICH REQUIRES THE FIDUCIARY TO
22 EXERCISE THE STANDARD OF CARE OF A REASONABLY PRUDENT
23 PROFESSIONAL IN THE HANDLING, PROTECTION, TRANSFORMATION, AND
24 COMMERCIALIZATION OF RAW AGRICULTURAL DATA OR TRANSFORMED
25 AGRICULTURAL DATA;

26 (c) THE DUTY OF DISCLOSURE, WHICH REQUIRES THE FIDUCIARY TO
27 FULLY AND PROMPTLY DISCLOSE TO THE AGRICULTURAL PRODUCER OR
28 DATA OWNER ALL INFORMATION MATERIAL TO THE PRODUCER'S OR DATA
29 OWNER'S AGRICULTURAL INTERESTS; AND

30 (d) THE DUTY TO ACCOUNT, WHICH REQUIRES THE FIDUCIARY TO
31 MAINTAIN ACCURATE RECORDS OF ALL TRANSACTIONS INVOLVING THE
32 AGRICULTURAL PRODUCER'S OR DATA OWNER'S RAW AGRICULTURAL DATA
33 OR TRANSFORMED AGRICULTURAL DATA AND TO PROVIDE A FULL
34 ACCOUNTING OF THOSE TRANSACTIONS UPON REQUEST."

35 Renumber succeeding subsections accordingly.

36 Page 15, after line 12 insert:

1 "(4) (a) THE OBLIGATIONS SET FORTH IN THIS SECTION ARE IN
2 ADDITION TO, AND DO NOT LIMIT, THE FIDUCIARY DUTY OWED BY A DATA
3 SERVICE PROVIDER TO AN AGRICULTURAL PRODUCER OR DATA OWNER
4 PURSUANT TO SECTION 35-2.5-104.

5 (b) A DATA SERVICE PROVIDER'S COMPLIANCE WITH THE SPECIFIC
6 PROHIBITIONS SET FORTH IN THIS SECTION SHALL NOT BE CONSTRUED AS
7 SATISFYING THE DATA SERVICE PROVIDER'S FIDUCIARY DUTY ESTABLISHED
8 BY SECTION 35-2.5-104.

9 **35-2.5-104. Fiduciary duty of data service providers -**
10 **non-waiver of fiduciary duty - standard of review.**

11 (1) A FIDUCIARY OWES AN AGRICULTURAL PRODUCER OR DATA
12 OWNER A FIDUCIARY DUTY.

13 (2) A FIDUCIARY HAS A DUTY OF LOYALTY TO AN AGRICULTURAL
14 PRODUCER OR DATA OWNER AND SHALL:

15 (a) ACT IN THE BEST INTERESTS OF THE AGRICULTURAL PRODUCER
16 OR DATA OWNER IN ALL MATTERS RELATING THE PRODUCER'S OR DATA
17 OWNER'S RAW AGRICULTURAL DATA OR TRANSFORMED AGRICULTURAL
18 DATA;

19 (b) DISCLOSE TO THE AGRICULTURAL PRODUCER OR DATA OWNER
20 ANY ACTUAL OR POTENTIAL CONFLICT OF INTEREST BETWEEN THE DATA
21 SERVICE PROVIDER'S INTERESTS AND THE INTERESTS OF THE
22 AGRICULTURAL PRODUCER OR DATA OWNER BEFORE ENGAGING IN ANY
23 DATA TRANSACTION INVOLVING THE AGRICULTURAL PRODUCER'S OR DATA
24 OWNER'S RAW AGRICULTURAL DATA OR TRANSFORMED AGRICULTURAL
25 DATA;

26 (c) NOT USE THE AGRICULTURAL PRODUCER'S OR DATA OWNER'S
27 RAW AGRICULTURAL DATA OR TRANSFORMED AGRICULTURAL DATA TO
28 BENEFIT THE DATA SERVICE PROVIDER AT THE EXPENSE OF THE
29 AGRICULTURAL PRODUCER OR DATA OWNER; AND

30 (d) NOT ENTER INTO AGREEMENTS WITH THIRD PARTIES THAT
31 COMPROMISE THE DATA SERVICE PROVIDER'S ABILITY TO UPHOLD THEIR
32 FIDUCIARY DUTY TO THE AGRICULTURAL PRODUCER OR DATA OWNER.

33 (3) A FIDUCIARY HAS A DUTY OF CARE TO AN AGRICULTURAL
34 PRODUCER OR DATA OWNER AND SHALL:

35 (a) EMPLOY REASONABLE TECHNICAL AND ORGANIZATIONAL
36 MEASURES TO PROTECT RAW AGRICULTURAL DATA AND TRANSFORMED
37 AGRICULTURAL DATA FROM UNAUTHORIZED ACCESS, DISCLOSURE,
38 ALTERATION, OR DESTRUCTION;

39 (b) EXERCISE PROFESSIONAL JUDGEMENT CONSISTENT WITH
40 INDUSTRY STANDARDS IN THE TRANSFORMATION AND
41 COMMERCIALIZATION OF RAW AGRICULTURAL DATA OR TRANSFORMED
42 AGRICULTURAL DATA; AND

43 (c) PROMPTLY NOTIFY AN AGRICULTURAL PRODUCER OR DATA
44 OWNER OF ANY BREACH, UNAUTHORIZED ACCESS, OR MATERIAL ADVERSE

1 EVENT AFFECTING THE PRODUCER'S OR DATA OWNER'S RAW
2 AGRICULTURAL DATA OR TRANSFORMED AGRICULTURAL DATA.

3 (4) A FIDUCIARY HAS A DUTY OF DISCLOSURE TO AN
4 AGRICULTURAL PRODUCER OR DATA OWNER AND SHALL:

5 (a) FULLY AND ACCURATELY DISCLOSE TO THE AGRICULTURAL
6 PRODUCER OR DATA OWNER, PRIOR TO ANY DATA TRANSACTION:

7 (I) THE IDENTITY OF ALL PROSPECTIVE PURCHASERS OR LICENSEES
8 OF THE TRANSFORMED AGRICULTURAL DATA;

9 (II) THE PROPOSED COMPENSATION TO BE PAID TO THE
10 AGRICULTURAL PRODUCER OR DATA OWNER;

11 (III) THE INTENDED USES OF THE TRANSFORMED AGRICULTURAL
12 DATA BY THE PROSPECTIVE PURCHASER OR LICENSEE; AND

13 (IV) THE FEES, COMMISSIONS, OR OTHER CONSIDERATION THAT
14 WILL BE RETAINED BY THE DATA SERVICE PROVIDER AS PART OF THE DATA
15 TRANSACTION;

16 (b) MAINTAIN A PUBLICLY ACCESSIBLE AND CURRENT DISCLOSURE
17 OF THE MARKETS IN WHICH THE DATA SERVICE PROVIDER
18 COMMERCIALIZES RAW AGRICULTURAL DATA OR TRANSFORMED
19 AGRICULTURAL DATA; AND

20 (c) DISCLOSE TO THE AGRICULTURAL PRODUCER OR DATA OWNER,
21 WITHIN THIRTY DAYS OF A REQUEST, THE TOTAL REVENUES DERIVED BY
22 THE DATA SERVICE PROVIDER FROM THE COMMERCIALIZATION OF THE
23 AGRICULTURAL PRODUCER OR DATA OWNER'S RAW AGRICULTURAL DATA
24 OR TRANSFORMED AGRICULTURAL DATA FROM THE PREVIOUS THREE
25 YEARS.

26 (5) A FIDUCIARY HAS A DUTY TO ACCOUNT TO AN AGRICULTURAL
27 PRODUCER OR DATA OWNER AND SHALL:

28 (a) MAINTAIN COMPLETE AND ACCURATE RECORDS OF ALL DATA
29 TRANSACTIONS INVOLVING EACH AGRICULTURAL PRODUCER'S OR DATA
30 OWNER'S RAW AGRICULTURAL DATA OR TRANSFORMED AGRICULTURAL
31 DATA FOR A PERIOD OF NOT LESS THAN SEVEN YEARS;

32 (b) PROVIDE A FULL, WRITTEN ACCOUNTING OF ALL DATA
33 TRANSACTIONS INVOLVING THE AGRICULTURAL PRODUCER'S OR DATA
34 OWNER'S RAW AGRICULTURAL DATA OR TRANSFORMED AGRICULTURAL
35 DATA TO THE AGRICULTURAL PRODUCER OR DATA OWNER WITHIN SIXTY
36 DAYS AFTER RECEIVING A WRITTEN REQUEST FROM THE AGRICULTURAL
37 PRODUCER OR DATA OWNER;

38 (c) RENDER QUARTERLY STATEMENTS TO AN AGRICULTURAL
39 PRODUCER OR DATA OWNER SHOWING ALL TRANSACTIONS INVOLVING THE
40 AGRICULTURAL PRODUCER'S OR DATA OWNER'S RAW AGRICULTURAL DATA
41 OR TRANSFORMED AGRICULTURAL DATA AND ALL COMPENSATION PAID OR
42 OWED TO THE FIDUCIARY DURING THE PRECEDING QUARTER.

43 (6) THE FIDUCIARY DUTY ESTABLISHED BY THIS SECTION MAY NOT
44 BE WAIVED, REDUCED, OR MODIFIED BY CONTRACT, TERMS OF SERVICE,
45 END USER LICENSE AGREEMENT, OR OTHER AGREEMENT OR INSTRUMENT.

1 ANY CONTRACTUAL PROVISION PURPORTING TO WAIVE OR LIMIT THE
2 FIDUCIARY DUTY IS VOID AND UNENFORCEABLE.

3 (7) IN ANY ACTION ASSERTING A BREACH OF FIDUCIARY DUTY
4 ESTABLISHED BY THIS SECTION, THE DATA SERVICE PROVIDER BEARS THE
5 BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT THE
6 DATA SERVICE PROVIDER ACTED IN THE BEST INTERESTS OF THE
7 AGRICULTURAL PRODUCER OR DATA OWNER RELATED TO THE CONDUCT
8 ALLEGED TO CONSTITUTE THE BREACH OF FIDUCIARY DUTY."

9 Renumber succeeding C.R.S. sections accordingly.

10 Page 21, line 5, strike "- penalty." and substitute "**penalty - breach of**
11 **fiduciary duty.**".

12 Page 22, after line 3 insert:

13 "(5) (a) A BREACH OF THE FIDUCIARY DUTY ESTABLISHED
14 PURSUANT TO SECTION 35-2.5-104 IS ACTIONABLE AS A SEPARATE AND
15 INDEPENDENT CAUSE OF ACTION BY AN AGRICULTURAL PRODUCER OR
16 DATA OWNER AGGRIEVED BY THE BREACH, IN ADDITION TO ANY OTHER
17 REMEDIES AVAILABLE PURSUANT TO THIS ARTICLE 2.5 OR OTHER STATE
18 LAW.

19 (b) IF AN AGRICULTURAL PRODUCER OR DATA OWNER PREVAILS IN
20 AN ACTION FOR BREACH OF FIDUCIARY DUTY, THE AGRICULTURAL
21 PRODUCER OR DATA OWNER IS ENTITLED TO:

22 (I) ACTUAL DAMAGES FOR ALL LOSSES SUFFERED AS A RESULT OF
23 THE BREACH;

24 (II) DISGORGEMENT OF ALL PROFITS RECEIVED BY THE DATA
25 SERVICE PROVIDER ARISING FROM OR RELATED TO THE BREACH, WITHOUT
26 REGARD TO WHETHER THE AGRICULTURAL PRODUCER OR DATA OWNER
27 CAN DEMONSTRATE A DOLLAR-FOR-DOLLAR LOSS;

28 (III) IMPOSITION OF A CONSTRUCTIVE TRUST OVER ALL PROCEEDS
29 DERIVED FROM THE DATA SERVICE PROVIDER'S COMMERCIALIZATION OF
30 THE AGRICULTURAL PRODUCER'S OR DATA OWNER'S RAW AGRICULTURAL
31 DATA OR TRANSFORMED AGRICULTURAL DATA THAT WERE DERIVED AS A
32 RESULT OF THE BREACH OF FIDUCIARY DUTY;

33 (IV) PUNITIVE DAMAGES UPON A SHOWING THAT THE BREACH WAS
34 WILLFUL, KNOWING, OR IN RECKLESS DISREGARD OF THE DATA SERVICE
35 PROVIDER'S FIDUCIARY DUTY;

36 (V) INJUNCTIVE RELIEF, INCLUDING PRELIMINARY INJUNCTIONS
37 AND TEMPORARY RESTRAINING ORDERS, TO PREVENT ONGOING OR
38 POTENTIAL BREACHES; AND

39 (VI) REASONABLE ATTORNEY FEES AND COSTS.

40 (c) THE ATTORNEY GENERAL MAY BRING AN ACTION IN THE NAME
41 OF THE STATE FOR BREACH OF THE FIDUCIARY DUTY ESTABLISHED

1 PURSUANT TO SECTION 35-2.5-104 ON BEHALF OF ONE OR MORE
2 AGRICULTURAL PRODUCERS OR DATA OWNERS AND MAY SEEK ANY OF THE
3 REMEDIES SET FORTH IN SUBSECTION (5)(b) OF THIS SECTION AND ANY
4 CIVIL PENALTIES OF NOT MORE THAN ONE HUNDRED THOUSAND DOLLARS
5 PER WILLFUL VIOLATION.

6 (d) AN ACTION FOR BREACH OF FIDUCIARY DUTY BROUGHT
7 PURSUANT TO THIS SUBSECTION (5) MUST BE BROUGHT WITHIN SIX YEARS
8 AFTER THE DATE ON WHICH THE AGRICULTURAL PRODUCER OR DATA
9 OWNER THAT IS ALLEGING THE BREACH DISCOVERED OR REASONABLY
10 SHOULD HAVE DISCOVERED THE BREACH."

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