HB567: Maryland Online Data Privacy Act of 2024
Economic Matters Committee
February 13, 2024

Position: Unfavorable as introduced, neutral with amendments

Background: HB567 establishes generally the manner in which a controller or a processor may process a consumer's personal data; authorizing a consumer to exercise certain rights in regards to the consumer's personal data; requiring a controller of personal data to establish a method for a consumer to exercise certain rights in regards to the consumer's personal data; etc.

Comments: Based on feedback received from members, the Maryland Retailers Alliance respectfully proffers the following amendments to HB567:

1. Page 5, line 13: INSERT "intentionally" before "designed or manipulated."
    a. Dark pattern violations are like fraud and should be considered an intentional act of deceit.

2. Page 4, line 23, Strike lines 21-23 and INSERT in its place "(I)(1) "Consumer health data" means personally identifiable information that is linked or reasonably capable of being linked to a consumer and that a regulated entity uses to identify the past, present or future physical or mental health status of the consumer."
    a. This change further clarifies the meaning of the term.

3. Page 6, line 1: STRIKE OR DEFINE "(8) access to essential goods or services".
    a. This is problematic without a precise definition of "essential goods and services".

4. Page 8, line 13: AMEND the definition of "processor" to include that a processor "does not determine the purposes or means of processing the personal data".
    a. The current definition is missing this key limitation which was included in all other state privacy laws.
    b. Did processors request that this limitation be left out of the Maryland draft?

5. Page 11, line 1: STRIKE line 1 "((VIII) Citizenship or immigration status)", ADJUST remaining numbering.
    a. This list of potentially sensitive data qualifiers should be struck as it broadens the defined term of "sensitive data" to potentially include "non-personal data". This non-personal data may imply inaccurate information

about consumer (e.g., buying a cross might "reveal" one is Christian; buying cosmetics might "reveal" race). A law based on possible inferences drawn from retail purchases would be problematic.

6. Page 11, line 17: INSERT "unaffiliated" before "websites or online applications".
    a. The current definition of "target advertising" could include providing ads based on a consumer's activities on a business's first-party website or mobile app, which has no precedence of being considered targeted advertising in state privacy laws.
    b. This issue could also be addressed by adding "advertisements based on a consumer's activity displayed by a controller on any first-party website or mobile app owned or operated by that control" to the list of exemptions of "targeted advertising" beginning on page 10, line 20.

7. Page 11, after line 24: Recommend adding a second sentence that a third party must not determine the purposes or means of data processing, to reflect other recommendations regarding the definition of "processor" (page 8, line 5, mentioned above).

8. Page 12, line 8: REPLACE "produces" with "provides".
    a. "Provides" is a more standard term used for this policy in other states. "Produces" could have unclear meaning and unintended consequences.

9. Page 12, line 12: REPLACE "35,000 consumers" with "100,000 consumers".
    a. Setting the threshold at 35,000 is far too low to protect small businesses. Most states use 100,000.

10. Page 12, line 9: REPLACE "10,000 consumers" with "50,000 consumers" AND REPLACE "20%" with "50%".
    a. This should say at least 50,000 consumers and derived more than 50% of revenue from the sale to remain consistent with almost every other state.

11. Page 15, line 27: ADD ", unless retention of the personal data is required by law" after "consumer".
    a. Creates an exception that allows a controller to dismiss a consumer's request to delete and retain information if it is required by another area of law.

12. Page 19, lines 5-11: STRIKE lines 27-29 in entirety, from "(1) collect personal data..." through "share sensitive data concerning a consumer;" ADJUST remaining numbering.
    a. Section 14-4606(A)(1) and (2) are highly problematic. Like other consumer-facing businesses, retailers typically grow by attracting new customers. For example, retailers opening new store locations traditionally obtain lists of local households to send mailers announcing the new store opening. The law must preserve the same ability to collect data in the online environment for the purpose of marketing to prospective customers.

b. Further, the law should not limit collection or processing to that "strictly necessary" to provide or maintain a "specific product or service requested by the consumer". Retailers have always marketed products to inform the public of what is available for purchase. The inclusion of "strictly necessary" would limit the ability to provide this information to consumers.

13. Page 19, line 26: STRIKE "(1) Collect personal data for the sole purpose of content personalization or marketing without the consent of the consumer whose personal data is collected;", ADJUST remaining line number.
    a. Personalized marketing does not create a harm for a consumer and should not be treated like sensitive information.

14. Page 21, line 5: ADD "and processor" after "controller".
    a. Data minimization provisions should apply equally to both and not to controllers alone. There is no legitimate public policy justification for limiting this to controllers only; processors oppose data minimization requirements for their own benefit. The policy should establish an equal playing field.

15. Page 21, line 21: REPLACE "15" with "45".
    a. Extends the amount of time controllers have to respond to consumer requests to be in line response requirements on Page 17, lines 5 and 8 and consistent with requirements in other states' consumer privacy laws.

16. Page 25, line 1-3: STRIKE "the controller shall comply with the consumer's opt-out preference signal. (2)"
    a. The indicated phrase would require the general opt-out preference (signaled by a browser) to override a consumer's previous opt-in to voluntarily participate in a controller's loyalty program. The recommended edit would clarify this for the customer and allow them to choose to continue participation in the loyalty program, rather than automatically overriding their original opt-in choice.

17. Page 27, line 16: INSERT "designed" before "to ensure".
    a. Controllers cannot guarantee that a processor will adhere to instructions. Including "designed" protects controllers when processors do not follow instructions that are intended to limit consumer data processing.

18. Page 28, line 15: STRIKE "(V) Other substantial injury to a customer".
    a. "Other substantial injury" is not defined, so this potential risk is unclear and should be removed.

19. Page 32 and 33, lines 29-2:
    a. The protection provided to third party controllers or processors in 14-4610(D) needs to run both ways to protect controllers from the independent misconduct of third-party processors and controllers, as it

does in most state privacy laws. Controllers must similarly be protected from the violations of the law by processors and third parties and held harmless unless they have actual knowledge the processor or third party intends to violate the law with the consumer data they receive from the controller.

20. Page 33, lines 10-12: ADD "or processor" after "If a controller" and ADD "or processor" before "shall demonstrate that the processing:"
    a. This obligation should apply equally to both controllers and processors.

21. Page 34, lines 11-12: STRIKE lines 11-12 in entirety, from "(B) This section" to "other remedy provided by law".
    a. We would ask that private right of action be prohibited.
    b. Making clear AG enforcement via the following language: "THE ATTORNEY GENERAL SHALL HAVE EXCLUSIVE ENFORCEMENT AUTHORITY TO ENFORCE VIOLATIONS OF THIS ACT. (D) NOTHING IN THIS ACT SHALL BE CONSTRUED AS PROVIDING THE BASIS FOR, OR BE SUBJECT TO, A PRIVATE RIGHT OF ACTION FOR VIOLATIONS OF THIS OR ANY OTHER LAW."

22. Page 34, line 18: REPLACE "2024" with "2025".
    a. Controllers need adequate time to prepare for compliance with these requirements.

23. Other States have a "right to cure" provision including California. We would respectfully ask for one with a sunset to ensure compliance.

Additionally, MRA has historically expressed concerns to the legislature regarding the impact that data privacy policies may have on the ability to offer retail loyalty rewards programs, which customers voluntarily choose to participate in for access to discounts and other rewards. Page 21 of the bill prohibits retailers from charging different prices for goods if a customer opts out of data sharing, which would restrict access to loyalty programs and which was not included in laws in the majority of other states.

The bill already has a disclosure requirement for data sales, and not all retailers engage in data sales with respect to their customer loyalty plan data, so it does not make sense to add a duplicative disclosure requirement or, worse, ban data sales from loyalty plans when their data sales are not banned outright in every other use case.

We suggest adding language clarifying that the disclosure requirements related to data sales also applies to loyalty plans, and that a retailer may not offer a loyalty program unless they are in compliance with those disclosure obligations in subsection (E) of the same section 14-4607 where the loyalty plan language is located. Suggested amendment in bold:

14–4607.

* * *

(C) NOTHING IN SUBSECTION (A) OR (B) OF THIS SECTION MAY BE CONSTRUED TO:

* * *

(2) PROHIBIT A CONTROLLER FROM OFFERING A DIFFERENT PRICE, RATE, LEVEL, QUALITY, OR SELECTION OF GOODS OR SERVICES TO A CONSUMER, INCLUDING OFFERING GOODS OR SERVICES FOR NO FEE, IF THE OFFERING IS IN CONNECTION WITH A CONSUMER'S VOLUNTARY PARTICIPATION IN A BONA FIDE LOYALTY, REWARDS, PREMIUM FEATURES, DISCOUNTS, OR CLUB CARD PROGRAM **THAT COMPLIES WITH SUBSECTION (E)**.

Thank you for your consideration. We look forward to working with the sponsor and committee to resolve these issues.