

SB 613

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 613

(Senator Lee)

Finance

Online Consumer Protection Act

This bill establishes numerous personal information privacy rights for consumers in the State. Specifically, the bill establishes consumers the right to (1) know whether (and what) personal information is collected or disclosed by a business; (2) access (and obtain a copy of) personal information collected by a business; (3) have personal information deleted by a business; (4) stop a business from disclosing information to third parties; and (5) equal service and pricing, regardless of whether the consumer has exercised his or her rights under the bill. The Office of the Attorney General (OAG) is authorized to take specified actions to enforce the bill and required to adopt regulations, as specified. **The bill takes effect January 1, 2021.**

Fiscal Summary

State Effect: General fund revenues increase minimally due to the bill's civil penalty provisions. OAG can implement the bill's requirements with existing resources, as discussed below.

Local Effect: The bill does not materially affect local government finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Applicability Provisions

The bill applies to any for-profit business that collects the personal information of Maryland consumers and satisfies one or more of the following thresholds:

- has annual gross revenues of more than \$25 million;
- annually buys, receives (for commercial purposes), sells, or shares (for commercial purposes), alone or in combination, the personal information of 100,000 or more consumer, households, or devices; or
- derives at least one-half of its annual revenues from selling consumers' personal information.

For purposes of the bill, "business" means a sole proprietorship, limited liability corporation, a corporation, association, or any other legal entity operated for-profit or the financial benefit of owners and shareholders.

The bill also applies to any entity that (1) controls (or is controlled by) a business subject to the bill's requirements and (2) shares a name, service mark, or trademark with the business.

The bill defines "personal information" as information relating to an identified (or identifiable) consumer and information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked (directly or indirectly) with a particular consumer or the consumer's device. "Personal information" does not include information that is lawfully made available from government records or consumer information that is de-identified or aggregate consumer information.

Required Disclosures

The bill requires a business that collects a consumer's personal information to notify a consumer (at or before the point of collection) of (1) the categories of personal information the business will collect; (2) the business purposes for which the categories of personal information may be used; (3) the categories of third parties to which the business discloses personal information; and (4) the business purpose for third-party disclosure, as specified.

In addition, the business must notify a consumer of his or her rights to request (1) a copy of the consumer's personal information; (2) the deletion of the consumer's personal information; and (3) to opt-out of third-party disclosure.

Right to Request a Copy of Personal Information

The bill allows a consumer to request that a business that collects a consumer's personal information disclose:

- the specific personal information the business has collected about that consumer;
- the sources from which the consumer's personal information was collected;
- the names of third parties to which the business disclosed the consumer's personal information; and
- the business purpose for third-party disclosure.

A business that receives a verifiable consumer request must promptly take steps to deliver (free of charge) the required information. The bill specifies the manner in which the information may be provided and establishes that a business may only be required to provide personal information to the same consumer two times in a 12-month period. If requests from a consumer are manifestly unfounded or excessive, a business may either charge a reasonable fee or refuse to act on the request and notify the consumer of the reason for refusing the request.

Access to Personal Information

The bill requires a business to make available to consumers two or more designated methods for submitting requests, including (if the business maintains a website) a link on the homepage of the website. A business is prohibited from requiring a consumer to create an account with the business in order to make a request.

Generally, within 45 days of receiving a verifiable consumer request for a copy of personal information, a business must deliver (free of charge) the required information in a readily useable format that allows the consumer to transmit the information from one entity to another entity without hindrance.

The bill requires a business to include specified information in its online privacy policy (if applicable), or (if the business does not maintain such a policy), on its website. The information must be updated once every 12 months. A business must ensure that all individuals responsible for handling consumer inquiries regarding privacy practices are informed of the bill's requirements and how to direct consumers to exercise their rights.

Right to Delete Personal Information

The bill allows a consumer to request that a business delete any personal information about the consumer that the business has collected. If a business receives such a request, the business must delete the consumer's personal information from its records and direct any service providers to delete the consumer's personal information as well. The bill also identifies the instances in which a business or service provider is not required to comply with a request to delete a consumer's personal information.

Right to Request Information Not Be Sold to Third Parties

The bill allows a consumer to demand that a business not disclose the consumer's personal information to third parties. (However, in no circumstances may a business disclose the personal information of a consumer to a third party if the business has actual knowledge or willfully disregards that the consumer is younger than age 18.) A business that receives this direction from a consumer may not disclose the consumer's personal information to third parties unless the consumer later provides express authorization. In addition, a business may not subsequently request authorization to disclose the consumer's personal information to third parties for at least 12 months.

A business must provide a clear and conspicuous link on the homepage of the business to an Internet webpage that enables a consumer (or an authorized person) to opt-out of the third-party disclosure of the consumer's personal information. A business may not require a consumer to create an account in order to exercise this right.

Right to Receive Equal Service

The bill prohibits discrimination against a consumer because the consumer exercised his or her rights under the bill. Discrimination includes:

- denying goods or services to the consumer;
- charging different prices or rates for goods or services (including through the use of discounts or other benefits, or imposing penalties);
- providing a different level or quality of goods or services to the consumer;
- suggesting that the consumer will receive a different price or rate for goods or services (or a different level of quality of goods or services).

Exceptions to the Bill's Requirements

The bill's requirements may not restrict the ability of any business or third party to (1) comply with federal, state, or local laws; (2) comply with a civil, criminal, or regulatory

inquiry, investigation, subpoena, or summons by a federal, state, or local authority; (3) cooperate with law enforcement agencies concerning conduct or activity that the business, service provider, or third party reasonably (and in good faith) believes may violate federal, state, or local law; (4) exercise legal rights or privileges; or (5) engage in news-gathering activities protected by the First Amendment.

The bill also identifies other instances in which its requirements do not apply and specifies the manner in which research with personal information may be used.

Office of the Attorney General

If OAG has reason to believe that any business, service provider, or other person is in violation of the bill's requirements (and that proceedings would be in the public interest), OAG may (1) bring an action in the name of the State against the party to restrain the violation by temporary restraining order or preliminary or permanent injunction and (2) seek a civil penalty of up to \$2,500 for each violation (or up to \$7,500 for each intentional violation). The bill also establishes liability standards for businesses and service providers.

OAG must solicit broad public participation and adopt regulations as specified to further the purposes of the bill by July 1, 2021. Regulations must include, among other things, provisions for updating unique identifiers, facilitating submission of verifiable consumer requests, establishing consumer notification standards and establishing necessary exceptions to comply with federal and State laws. OAG is prohibited from bringing an enforcement action under the bill until six months after the publication of the final regulations issued in accordance with the bill.

Other Legal/Contractual Provisions

The bill specifies that, wherever possible, law relating to consumers' personal information should be construed to harmonize with the provisions of the bill. However, 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.

If a series of steps (or transactions) where component parts of a single transaction were taken with the intention of avoiding the reach of the bill, a court must disregard the intermediate steps or transactions for purposes of carrying out the bill.

Any provision of a contract (or an agreement of any kind) that purports to waive or limit in any way a consumer's rights under the bill (including any remedy or means of enforcement) must be considered contrary to public policy and must be void and unenforceable.

Current Law/Background:

Internet Privacy

State law does not generally regulate Internet privacy. However, businesses are required under the Maryland Personal Information Protection Act to take precautions to secure the personal information of customers and to provide notice of information of breaches.

In addition, the Social Security Number Privacy Act (Chapter 521 of 2005) prohibits specified disclosures of an individual's Social Security number (SSN). However, the law exempts entities that provide Internet access (including "interactive computer service providers" and telecommunications providers) under specified circumstances. More specifically, the law does not apply to an interactive computer service provider's or a telecommunication's provider's *transmission or routing of* (or intermediate temporary storage or caching of) an individual's SSN. In addition, the law does not impose a duty on an interactive computer service provider or a telecommunications provider to monitor its service or to seek evidence of the transmission of SSNs on its service.

Federal Actions Regarding Internet Privacy

In 2016, the Federal Communications Commission (FCC) adopted rules that required broadband ISPs to protect the privacy of their customers. According to FCC, the rules established a framework of customer consent required for ISPs to use, sell, and share their customers' personal information. The rules separated the use and sharing of information into three categories and included guidance for both ISPs and customers about the transparency, choice, and security requirements for customers' personal information.

- *Opt In:* For certain sensitive information, ISPs would have been required to obtain affirmative "opt-in" consent from consumers to use and share the information. The rules specified categories of information considered sensitive, including precise geo-location, financial information, health information, children's information, SSNs, web browsing history, app usage history, and the content of communications.
- *Opt Out:* ISPs would have been allowed to use and share other, nonsensitive, information unless the customer "opted-out." For example, email address information would have been considered nonsensitive information, and the use and sharing of that information would have been subject to opt-out consent.
- *Exceptions to Consent Requirements:* Customer consent was inferred for certain specified purposes, including the provision of broadband service or billing and collection. For the use of this information, no additional consent would have been required beyond the creation of the customer-ISP relationship.

The rules established other provisions, including:

- transparency requirements for ISPs to provide customers with clear, conspicuous, and persistent notice about the information collected, how it was to be used, and with whom it could have been shared, as well as how customers could change their privacy preferences;
- a requirement that broadband providers engage in reasonable data security practices and guidelines on steps ISPs should consider taking, such as implementing relevant industry best practices, providing appropriate oversight of security practices, implementing robust customer authentication tools, and proper disposal of data; and
- data breach notification requirements to encourage ISPs to protect the confidentiality of customer data and to give consumers and law enforcement notice of failures to protect such information.

The scope of the rules was limited to broadband service providers and other telecommunications carriers. The rules did not apply to the privacy practices of websites and other services over which the Federal Trade Commission, rather than FCC, has authority. In addition, the scope of the rules did not include other services of a broadband provider, such as the operation of a social media website, nor did the rules cover issues such as government surveillance, encryption, or law enforcement.

The rules were originally scheduled to take effect in 2017. However, in early 2017, the U.S. Congress approved a resolution of disapproval nullifying the FCC rule. The President signed the resolution on April 3, 2017.

California Online Privacy Law

The bill is similar to a [California law](#) that was enacted in 2018. Among other things, that law establishes that a consumer has the right to request that a business disclose categories and specific pieces of personal information the business has collected about the consumer. Consumers may request that a business delete any personal information that the business has collected about the consumer. In addition, consumers may direct a business not to sell their personal information. The law also prohibits discrimination against a consumer because the consumer exercised his or her rights under the law.

State Fiscal Effect: While the bill authorizes OAG to bring an action against a party for a violation of the bill and requires OAG to adopt regulations, OAG advises it can implement the bill's requirements with existing resources.

Because OAG may also seek a civil penalty (of up to \$2,500 for each violation, or \$7,500 for each intentional violation), general fund revenues may increase to the extent that cases are successfully brought and the civil penalty is imposed. However, the impact

on the general fund is likely to be minimal. Also, any fiscal impact is presumed not to occur until fiscal 2022, since OAG cannot bring any enforcement actions until six months after its regulations enforcing the bill are promulgated.

Small Business Effect: The bill establishes numerous requirements for businesses that handle the personal information of consumers. To the extent that any small businesses meet the thresholds identified by the bill, such businesses are likely to be meaningfully affected by the bill's requirements.

The Department of Legislative Services advises that the exact number of small businesses that may be affected by the bill cannot be determined due to insufficient data. However, any small businesses that do meet the bill's criteria as a "business" must comply with the bill's personal information protection requirements and may incur significant costs to do so.

Additional Information

Prior Introductions: None.

Cross File: HB 901 (Delegate Carey, *et al.*) - Economic Matters.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Judiciary (Administrative Office of the Courts); California State Legislature; *New York Times*; Department of Legislative Services

Fiscal Note History: First Reader - March 5, 2019
md/kdm

Analysis by: Eric F. Pierce

Direct Inquiries to:
(410) 946-5510
(301) 970-5510