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February 14, 2024

TO: The Honorable Pamela Beidle, Chair
Finance Committee

FROM: Hanna Abrams, Assistant Attorney General

RE: Senate Bill 541 – Consumer Protection – Maryland Online Data Privacy
Act of 2024 (SUPPORT WITH AMENDMENT)

The Consumer Protection Division of the Office of the Attorney General supports Senate Bill 541 (“SB 541”), sponsored by Senators Gile, Hester, Augustine, Feldman, and Ellis and Chair Beidle. Senate Bill 541 provides Marylanders with much needed control over who can collect, share, use, and sell their personal information.

Today, companies collect vast amounts of consumer data without consumer knowledge or consent. This data is sometimes used to serve consumer needs, but it can also be used to target, exploit, and expose consumers in harmful and sometimes dangerous ways.¹ Consumer data is often combined to provide detailed insights into very personal issues including mental health, gender, racial identity, religious beliefs, sexual preferences, and even our precise locations.² Indeed, data brokers compile data into lists of specific individuals with highly personal characteristics³ and sell it to third parties to be used to deliver everything from targeted

¹ See Technology Safety, Data Privacy Day 2019: Location Data & Survivor Safety (Jan. 28, 2019), <https://www.techsafety.org/blog/2019/1/30/data-privacy-day-2019-location-data-amp-survivor-safety>.

² Lee Matthews, *70% Of Mobile Apps Share Your Data with Third Parties*, Forbes, (June 13, 2017), <https://www.forbes.com/sites/leemathews/2017/06/13/70-percent-of-mobile-apps-share-your-data-with-third-parties/#562270ce1569> (finding that at least 70% of mobile apps share data with third parties, and 15% of the apps reviewed were connected to five or more trackers).

³ Drew Harwell, *Now For Sale: Data on Your Mental Health*, Washington Post (Feb.14, 2023), <https://www.washingtonpost.com/technology/2023/02/13/mental-health-data-brokers/> (citing a Duke University study that found that based on data amassed online data brokers marketed lists of individuals suffering from anxiety and a spreadsheet entitled “Consumers with Clinical Depression in the United States”).

advertising,⁴ to differential pricing, to enable algorithmic scoring⁵ which can have discriminatory outcomes.⁶ Unlike consumers in thirteen other states, Maryland consumers have no knowledge or control over what is collected about them or what is done with that personal information.

Senate Bill 541 provides individuals with some transparency into and control over how their data is used. This transparency, coupled with giving users the right to access, correct, or delete their data, empowers individuals to protect themselves. They can reduce their data footprint, or remove their data from insecure third parties, minimizing the risk of fraud, identify theft, and exploitation.

Consumer Rights Provided by Senate Bill 541

Senate Bill 541 will provide Marylanders with important rights over their personal information, and impose specific obligations on businesses who handle consumers' personal data, including:

- *Right to Know:* consumers will have the right to know whether controllers are processing their data, as well as the categories of data being processed and the third parties the data has been disclosed to. Consumers will also have a right to obtain a copy of the consumer's personal data that a controller has or is processing;
- *Right to Correct:* Consumers will have the right to correct inaccuracies in their data;
- *Right to Delete:* Consumers will have the right to require a controller to delete their personal data;
- *Right to Opt-out of Sale:* Consumers will have the right to opt out of processing of the personal data for targeted advertising, sale, or profiling of the consumer in a way that produces legal effects.

In addition, SB 541 provides heightened protections for “sensitive data” – including, genetic, biometric, and geolocation data – which by its nature is especially revealing. Senate Bill 541 provides specific limitations on data that “presents a heightened risk of harm to a consumer” by limiting entities' ability to sell, monetize, or exploit this data.

⁴ *FTC Enforcement Action to Bar GoodRx from Sharing Consumers' Sensitive Health Info for Advertising* (Feb. 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising>.

⁵ A Berkeley study found that biases in “algorithmic strategic pricing” have resulted in Black and Latino borrowers paying higher interest rates on home purchase and refinance loans as compared to White and Asian borrowers. This difference costs them \$250 million to \$500 million every year. Laura Counts, *Minority homebuyers face widespread statistical lending discrimination, study finds*, Haas School of Business at the University of California, Berkeley, (Nov. 13, 2018), <http://newsroom.haas.berkeley.edu/minority-homebuyers-face-widespread-statistical-lending-discrimination-study-finds/>; Upturn, *Led Astray: Online Lead Generation and Payday Loans*, (Oct. 2015), <https://www.upturn.org/reports/2015/led-astray/>. See also Yeshimabeit Millner and Amy Traub, *Data Capitalism and Algorithmic Racism, Data for Black Lives and Demos* (2021), https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf

⁶ Julia Angwin et al., *Facebook (Still) Letting Housing Advertisers Exclude Users By Race*, ProPublica (Nov. 21, 2017), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin>.

Importantly, SB 541 sets an important baseline requirement that entities only collect data that “is reasonably necessary and proportionate to provide or maintain a specific product or service requested by the consumer to whom the data pertains.” This limits the misuse and accidental leakage of data by restricting what is collected at the outset.

Proposed Amendments

We do, however, have some recommendations in connection with SB 541:

Definitions:

Affiliate: In SB 541, “affiliate” is defined as a person that “shares common branding with another person” (page 2, lines 20-23) with no other limitations. We have concerns that this definition is overly broad and captures more than what would be traditionally considered an “affiliate.” We recommend amending the definition of affiliate to:

a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another person such that: (a) The person owns or has the power to vote more than 50 percent of the outstanding shares of any voting class of the other person’s securities; (b) The person has the power to elect or influence the election of a majority of the directors, members or managers of the other person; (c) The person has the power to direct the management of another person; or (d) The person is subject to another person’s exercise of the powers described in paragraph (a), (b) or (c) of this subsection.⁷

Deidentified Data: Page 6, line 5, replace the word “if” with “and” to conform to the definition found in the Maryland Genetic Information Privacy Act.

Personal Data: On page 7, we recommend adding to the end of line 20 “consumer *or to a device identified by a unique identifier*” in order to be consistent with the definition of targeted advertising.

Exemptions:

We have concerns about the breadth of the exemptions in SB 541 that could serve to dilute the effect of the law, which we have shared with the sponsor. For example, page 12 lines 28-30, exempts *all* financial institutions and *all* affiliates of financial institutions subject to the federal Gramm-Leach-Bliley Act (GLBA) regardless of whether the personal data is governed by the GLBA. Advocates for financial institutions will claim that the industry is highly regulated and therefore they do not need additional privacy regulations, but financial institutions and their affiliates regularly collect information that is not governed by the GLBA. For example, when a financial institution collects information from non-customers or obtains information from a third-party or an affiliate outside of the context of providing a joint product or service, that personal information is not governed by federal privacy regulations.⁸ Given the breadth of the affiliate

⁷ Oregon Consumer Privacy Act, definition of “affiliate.”

⁸ 16 CFR § 313.1(b).

relationship, the Division recommends that page 12, lines 28-30 be replaced with the following language:

- (3)(i) A financial institution, as defined by Md. Code, Fin. Inst. § 1-101, or a financial institution’s affiliate or subsidiary that is only and directly engaged in financial activities, as described in 12 U.S.C. 1843(k);*
- (ii) An insurer, as defined by Md. Code, Ins. §§ 1-101(v), other than a person that, alone or in combination with another person, establishes and maintains a self-insurance program and that does not otherwise engage in the business of entering into policies of insurance;*
- (iii) An insurance producer, as defined by Md. Code, Ins. § 1-101(u); and*
- (iv) A person that holds a license issued under Md. Code, Ins. § 10-103.*

Similarly, we recommend clarifying that the exemption found on page 13, line 3, applies to protected health information that is regulated by the Health Insurance Portability and Accountability Act of 1996 by replacing it with the following language:

Protected health information that a covered entity or business associate processes in accordance with, or documents that a covered entity or business associate creates for the purpose of complying with, the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, and regulations promulgated under the Act, as in effect on the effective date of this 2023 Act.

Controller Obligations:

We recommend clarifying, on page 22, line 21, that the disclosure applies to “sale” as well as processing (conspicuously disclose the *sale or processing...*”). This resolves an internal inconsistency because according to lines 17-18, the paragraph applies if a controller “sells personal data . . . or processes personal data,” but the term sale is absent from the controller disclosure obligations on line 21.

Finally, we note that SB 541 does not include a private right of action. Without a private right of action, as the lone entity able to take action against violators, the Consumer Protection Division will need significantly more resources to enforce this bill. To that end, the Office of the Attorney General believes that a Privacy Protection and Enforcement Unit with sufficient resources should be established within the Consumer Protection Division.

We urge the Finance Committee to issue a favorable report on SB 541 with the amendments discussed.

cc: Members, Finance Committee
The Honorable Dawn Gile
The Honorable Malcolm Augustine
The Honorable Brian J. Feldman
The Honorable Pamela Beidle
The Honorable Arthur Ellis