



Consumer Federation of America



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Privacy Rights
Clearinghouse



February 12, 2021

The Honorable C.E. Hayes, Jr.
Chairman, Communications, Technology
and Innovation Committee
Pocahontas Building
900 E. Main Street
Richmond, VA 23219

Re: SB 1392, Consumer Data Protection Act

Dear Chairman Hayes,

The undersigned groups are organizations dedicated to consumer advocacy and protecting consumer privacy. We thank your committee for the opportunity to provide input, and to Sen. Marsden for his work to advance consumer privacy in Virginia through the Consumer Data Protection Act (CDPA). Our organizations have also signed a larger coalition letter outlining some reservations about the bill but wished to send this letter to you to underscore our top concerns.

While the CDPA would take some important steps to protecting Virginia consumers by establishing the right to know the information companies have collected about them, the right to delete that information, and the right to stop the disclosure of certain information to third parties, there are problems with the legislation that significantly limit the protections it would provide for Virginians from unwanted tracking and profiling, discriminatory practices, and sale of their personal information.

As you have recognized with this bill, average people have little insight into the ways that companies collect and use their information, and even fewer mechanisms for control over their personal data. We have worked with legislators across the country to encourage crafting legislation that gives consumers meaningful tools to better protect their privacy. To help address these issues, we offer the

Strengthen data minimization. It should be easy for consumers to understand what information is collected about them, and who has that information about them. Companies should have to ask consumers before they collect information at all – an opt-in framework rather than an opt-out framework. Making “opt-out” the default disempowers consumers and poses equity concerns; consumers with less time and resources to figure out how their data is being used and how to opt-out

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will inevitably be subject to more privacy violations. Where the default lies matters, as marketers well-know. It's time to change the default to "opt-in." Where the default lies matters, as marketers well-know. It's time to change the default to "opt-in."

Even within a consent framework, however, consumer privacy laws should limit the data that companies can collect and share. Consumers should be able to use an online service or app safely without having to take any action, such as opting in or opting out—by including a strong data minimization requirement that limits data collection and sharing to what is reasonably necessary to provide the service requested by the consumer. A strong default prohibition on data sharing is preferable to an opt-out based regime which relies on users to hunt down and navigate divergent opt-out processes for potentially hundreds of different companies.

Strengthen consumer's control of their personal information. Currently, the definition of personal data does not include information gleaned about consumers from sources such as social media if consumers have failed to adequately restrict who can see that information. This is not a reasonable exception in light of the fact that many consumers do not understand social media privacy settings or anticipate that their information could be harvested for commercial purposes. Furthermore, the definition of personal data does not include information that is linked or can be linked to a particular household or device, a major gap considering today's complex data ecosystem in which information from the use of smart devices is used to target users and households and treat them in different ways on the basis of that data, without knowing their exact identities.

Consumers have no right to stop their personal data from being sold to companies' affiliates – businesses they do not know and whose products and services may be very different from that of their parent companies. In addition, some of the rights that consumers do have are unduly limited; for instance, they can avoid seeing targeted ads based on tracking their activities, but not being tracked. Furthermore, since targeted advertising does not include a business advertising to consumers based on their activities on its own website or app, it does not cover the business models of Facebook and Google, who profit from targeting ads to consumers based on that data on behalf of other companies.

Consumers have the right not to be profiled only when the profiling would result in decisions that "produce legal or similarly significant effects" on them – a determination that would be made by the controller. In other words, they cannot simply decide that they do not wish to have inferences made about them based on the personal data that are collected about them and the proprietary algorithms that are used to produce those profiles. In addition, consumers cannot designate someone else to exercise their rights; for instance, an elderly woman could not ask her grown child to act on her behalf to request that her data be deleted. There are also problems with references to "known child," which would appear to limit parents' and guardians' abilities to act on behalf of their children if the controller did not know that consumer was a child.

Remove the verification requirement for opting out. Consumers should not have to pass a high bar to stop companies from using their information. CDPA gives consumers the right to opt out of certain uses of the consumer's information but requires that they verify their identities to do so. We ask that you remove this unnecessary hurdle to prevent people from exercising their privacy rights.

No pay for privacy. No one should be charged or penalized for asking companies to respect their privacy rights. And no one should be asked to pay more in order to protect their privacy. Yet this bill allows companies to charge consumers more or provide them with a lower quality of goods or services if they have exercised their rights – for instance, to avoid targeted advertising. This provision must be removed to avoid unfairly separating Virginians into two classes; those who can pay to protect their privacy, and those who cannot.

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Strengthen enforcement. The “right to cure” provision in the administrative enforcement section of the CDPA must be removed. It offers companies a “get-out-of-jail-free” card, significantly undermining the ability of the attorney general to take enforcement action when it deems it necessary and incentivizing companies to be lax about providing necessary privacy protections to their customers.

Finally, we respectfully ask that you include a private right of action, which is essential to ensure that consumer privacy laws have teeth. Private rights of action provide a valuable enforcement tool for everyday people and make clear that companies will face real consequences for privacy harms. People rightly can sue over product defects, car accidents, breach of contract, or injuries to reputation— they do not have to wait for the state attorney general to bring actions on their behalf in any of these instances. Privacy harms should be no exception.

We thank you again for your ongoing work, and for applying your technical expertise to give serious consideration to the important issue of consumer data privacy. Consumers have made clear that they want stronger data privacy laws—largely in reaction to the ways that companies use and abuse their information. We applaud your willingness to hear those concerns. Virginia has the opportunity to take a leadership position in the national conversation around data privacy. We urge you to seize this opportunity to enact meaningful privacy legislation that put the needs of people first and we would be happy to work with you on it, even if that means delaying final enactment. It is better to get this right than to enact a law that does not provide privacy protection that your constituents want and deserve.

Sincerely,

Susan Grant, Consumer Federation of America

Lee Tien, Electronic Frontier Foundation

Caitriona Fitzgerald, Electronic Privacy Information Center

Emory Roane, Privacy Rights Clearinghouse

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cc: The Honorable Members of the Communications, Technology, and Innovations Committee; The Honorable David W. Marsden