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January 29, 2023

The Honorable Kathy Tran
Pocahontas Building, Room E216
900 East Main Street
Richmond, VA 23219

RE: HB 2219 Health records privacy; consumer-generated health information

Dear Delegate Tran, Chairman Edmunds, and Members of the Committee,

On behalf of TechNet, I respectfully submit comments on HB 2219, regarding health records privacy and consumer-generated health information.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over five million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. TechNet has offices in Austin, Boston, Chicago, Denver, Harrisburg, Olympia, Sacramento, Silicon Valley, and Washington, D.C.

TechNet agrees that the protection of consumer health data is of critical importance; however, we are opposed to this bill's approach for several reasons.

Existing Law

The Virginia Legislature passed a comprehensive privacy law, the Virginia Consumer Data Protection Act (VCDPA), which went into effect on January 1, 2023. All of the personal data covered by HB 2219 is covered under the VCDPA with significant new rights for consumers, including rights to access, correct, port, and delete personal data. Consumers already must give opt-in consent to the use of their sensitive data under the VCDPA, which includes mental and physical health conditions. These rights have barely been tested, and now is not the right time to change the rules of the game for companies that have just rolled out mechanisms to enable these new rights.

Duplication of Rights

This bill would duplicate many of the rights which already exist in Virginia's privacy law with slightly different approaches, causing reengineering or changes to user interfaces for essentially the same outcome. For example, several of the provisions of this act require actions taken for de-identified and aggregate data. However, in the VCDPA, the data is not considered de-identified unless those actions have been taken. This bill does not provide added privacy protections in such cases. Companies already must publish a Privacy Policy to consumers under the VCDPA with information on the categories of third parties that may receive personal data, some of which would include personal data that is health related. This bill would require those entities to create new systems to inform consumers of a "detailed list" of all entities to whom such information may be disclosed. This would require significant reengineering of systems. No other state has required disclosure of specific entities. Further, other states specifically exempt disclosures to service providers.

Burdensome Opt-in Requirements

This bill requires consumer opt-in consent for several actions that have little, if any, privacy impact, and instead creates a frustrating, interruptive experience for users. For example, consumers must opt in to share data with service providers who are under contract with the provider to process the data. They already have obligations to protect the data. Other states and the FTC expressly exempt sharing data with service providers to provide the service to consumers. Consumers must agree to having their data stored in the cloud. Cloud service providers and companies providing services for devices are often able to provide superior protection for data separate from the device. The bill treats identified, aggregate, and de-identified data the same way, as if there were no privacy benefits to using privacy protective practices that tell us much about trends and concerns from larger groups. Opt-in consent is required for all three forms of data sharing.

Data Retention

This bill prohibits certain activity outright due to the suggested time constraints, even if needed to provide consumers the benefits of the product or protect consumers. For example, the bill suggests a 24-hour retention period, which is extremely short and would make it difficult for apps to function properly. As an example, many applications related to healthcare use data over long periods of time to track a consumer's progress. Sleep habits, weight fluctuations, or steps taken per day are all examples of tracking where more than 24 hours is needed. If providers must delete data in this timeframe, consumers would not be able to access helpful data they have specifically chosen to use.

Many companies use data to combat fraud and illegal activity. Requiring companies to delete data, including data that protects consumers from fraudsters and identity

theft, is counterintuitive. It is also important to distinguish between third party and first party data. Every app developer decides where to store their user's data and some companies don't store data collected by third party apps.

Private Right of Action

This bill creates a Private Right of Action to enforce these actions, but other states have recognized that this enforcement mechanism produces perverse results for their citizens and exposes companies to frivolous lawsuits. For example, the Illinois Biometric Information Privacy Act has resulted in numerous frivolous lawsuits and convictions for items such as photo organizing tools. Due to these PRAs, companies are electing not to provide certain services in other states. Virginia should encourage innovation that benefits consumers instead.

Consumer health data protection requires a thoughtful and consistent approach. For the above stated reasons, TechNet is opposed to HB 2219 and would recommend the legislature focus on the omnibus Virginia privacy law which recently took effect, before making additional changes to privacy standards. Thank you for your time and we look forward to continuing these discussions with you.

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