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SENATE BILL NO. 534

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Finance and Appropriations
on February 8, 2022)

(Patrons Prior to Substitute—Senators Marsden and McPike [SB 516])

A BILL to amend and reenact §§ 59.1-575 and 59.1-584, as they shall become effective, of the Code of Virginia and to repeal § 59.1-585 of the Code of Virginia, relating to Consumer Data Protection Act; enforcement; Consumer Privacy Fund.

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-575 and 59.1-584, as they shall become effective, of the Code of Virginia are amended and reenacted as follows:

§ 59.1-575. (Effective January 1, 2023) Definitions.

As used in this chapter, unless the context requires a different meaning:

"Affiliate" means a legal entity that controls, is controlled by, or is under common control with another legal entity or shares common branding with another legal entity. For the purposes of this definition, "control" or "controlled" means (i) ownership of, or the power to vote, more than 50 percent of the outstanding shares of any class of voting security of a company; (ii) control in any manner over the election of a majority of the directors or of individuals exercising similar functions; or (iii) the power to exercise controlling influence over the management of a company.

"Authenticate" means verifying through reasonable means that the consumer, entitled to exercise his consumer rights in § 59.1-577, is the same consumer exercising such consumer rights with respect to the personal data at issue.

"Biometric data" means data generated by automatic measurements of an individual's biological characteristics, such as a fingerprint, voiceprint, eye retinas, irises, or other unique biological patterns or characteristics that is used to identify a specific individual. "Biometric data" does not include a physical or digital photograph, a video or audio recording or data generated therefrom, or information collected, used, or stored for health care treatment, payment, or operations under HIPAA.

"Business associate" means the same meaning as the term established by HIPAA.

"Child" means any natural person younger than 13 years of age.

"Consent" means a clear affirmative act signifying a consumer's freely given, specific, informed, and unambiguous agreement to process personal data relating to the consumer. Consent may include a written statement, including a statement written by electronic means, or any other unambiguous affirmative action.

"Consumer" means a natural person who is a resident of the Commonwealth acting only in an individual or household context. It does not include a natural person acting in a commercial or employment context.

"Controller" means the natural or legal person that, alone or jointly with others, determines the purpose and means of processing personal data.

"Covered entity" means the same as the term is established by HIPAA.

"Decisions that produce legal or similarly significant effects concerning a consumer" means a decision made by the controller that results in the provision or denial by the controller of financial and lending services, housing, insurance, education enrollment, criminal justice, employment opportunities, health care services, or access to basic necessities, such as food and water.

"De-identified data" means data that cannot reasonably be linked to an identified or identifiable natural person, or a device linked to such person. A controller that possesses "de-identified data" shall comply with the requirements of subsection A of § 59.1-581.

~~"Fund" means the Consumer Privacy Fund established pursuant to § 59.1-585.~~

"Health record" means the same as that term is defined in § 32.1-127.1:03.

"Health care provider" means the same as that term is defined in § 32.1-276.3.

"HIPAA" means the federal Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. § 1320d et seq.).

"Identified or identifiable natural person" means a person who can be readily identified, directly or indirectly.

"Institution of higher education" means a public institution and private institution of higher education, as those terms are defined in § 23.1-100.

"Nonprofit organization" means any corporation organized under the Virginia Nonstock Corporation Act (§ 13.1-801 et seq.) or any organization exempt from taxation under § 501(c)(3), 501(c)(6), or 501(c)(12) of the Internal Revenue Code, *any political organization, any organization exempt from taxation under § 501(c)(4) of the Internal Revenue Code that is identified in § 52-41, and any*

60 subsidiaries and affiliates subsidiary or affiliate of entities organized pursuant to Chapter 9.1
61 (§ 56-231.15 et seq.) of Title 56.

62 "Personal data" means any information that is linked or reasonably linkable to an identified or
63 identifiable natural person. "Personal data" does not include de-identified data or publicly available
64 information.

65 "Political organization" means a party, committee, association, fund, or other organization, whether
66 or not incorporated, organized and operated primarily for the purpose of influencing or attempting to
67 influence the selection, nomination, election, or appointment of any individual to any federal, state, or
68 local public office or office in a political organization or the election of a presidential/vice-presidential
69 elector, whether or not such individual or elector is selected, nominated, elected, or appointed.

70 "Precise geolocation data" means information derived from technology, including but not limited to
71 global positioning system level latitude and longitude coordinates or other mechanisms, that directly
72 identifies the specific location of a natural person with precision and accuracy within a radius of 1,750
73 feet. "Precise geolocation data" does not include the content of communications or any data generated
74 by or connected to advanced utility metering infrastructure systems or equipment for use by a utility.

75 "Process" or "processing" means any operation or set of operations performed, whether by manual or
76 automated means, on personal data or on sets of personal data, such as the collection, use, storage,
77 disclosure, analysis, deletion, or modification of personal data.

78 "Processor" means a natural or legal entity that processes personal data on behalf of a controller.

79 "Profiling" means any form of automated processing performed on personal data to evaluate, analyze,
80 or predict personal aspects related to an identified or identifiable natural person's economic situation,
81 health, personal preferences, interests, reliability, behavior, location, or movements.

82 "Protected health information" means the same as the term is established by HIPAA.

83 "Pseudonymous data" means personal data that cannot be attributed to a specific natural person
84 without the use of additional information, provided that such additional information is kept separately
85 and is subject to appropriate technical and organizational measures to ensure that the personal data is not
86 attributed to an identified or identifiable natural person.

87 "Publicly available information" means information that is lawfully made available through federal,
88 state, or local government records, or information that a business has a reasonable basis to believe is
89 lawfully made available to the general public through widely distributed media, by the consumer, or by
90 a person to whom the consumer has disclosed the information, unless the consumer has restricted the
91 information to a specific audience.

92 "Sale of personal data" means the exchange of personal data for monetary consideration by the
93 controller to a third party. "Sale of personal data" does not include:

- 94 1. The disclosure of personal data to a processor that processes the personal data on behalf of the
95 controller;
- 96 2. The disclosure of personal data to a third party for purposes of providing a product or service
97 requested by the consumer;
- 98 3. The disclosure or transfer of personal data to an affiliate of the controller;
- 99 4. The disclosure of information that the consumer (i) intentionally made available to the general
100 public via a channel of mass media and (ii) did not restrict to a specific audience; or
- 101 5. The disclosure or transfer of personal data to a third party as an asset that is part of a merger,
102 acquisition, bankruptcy, or other transaction in which the third party assumes control of all or part of the
103 controller's assets.

104 "Sensitive data" means a category of personal data that includes:

- 105 1. Personal data revealing racial or ethnic origin, religious beliefs, mental or physical health
106 diagnosis, sexual orientation, or citizenship or immigration status;
- 107 2. The processing of genetic or biometric data for the purpose of uniquely identifying a natural
108 person;
- 109 3. The personal data collected from a known child; or
- 110 4. Precise geolocation data.

111 "State agency" means the same as that term is defined in § 2.2-307.

112 "Targeted advertising" means displaying advertisements to a consumer where the advertisement is
113 selected based on personal data obtained from that consumer's activities over time and across
114 nonaffiliated websites or online applications to predict such consumer's preferences or interests.
115 "Targeted advertising" does not include:

- 116 1. Advertisements based on activities within a controller's own websites or online applications;
- 117 2. Advertisements based on the context of a consumer's current search query, visit to a website, or
118 online application;
- 119 3. Advertisements directed to a consumer in response to the consumer's request for information or
120 feedback; or
- 121 4. Processing personal data processed solely for measuring or reporting advertising performance,

reach, or frequency.

"Third party" means a natural or legal person, public authority, agency, or body other than the consumer, controller, processor, or an affiliate of the processor or the controller.

§ 59.1-584. (Effective January 1, 2023) Enforcement; civil penalty; expenses.

A. The Attorney General shall have exclusive authority to enforce the provisions of this chapter.

B. Prior to initiating any action under this chapter, the Attorney General shall provide a controller or processor 30 days' written notice identifying the specific provisions of this chapter the Attorney General alleges have been or are being violated. If within the 30-day period, the controller or processor cures the noticed violation and provides the Attorney General an express written statement that the alleged violations have been cured and that no further violations shall occur, no action shall be initiated against the controller or processor.

C. If a controller or processor continues to violate this chapter following the cure period in subsection B or breaches an express written statement provided to the Attorney General under that subsection, the Attorney General may initiate an action in the name of the Commonwealth and may seek an injunction to restrain any violations of this chapter and civil penalties of up to \$7,500 for each violation under this chapter. *All civil penalties, expenses, and attorney fees collected pursuant to this chapter shall be paid into the state treasury and credited to the Regulatory, Consumer Advocacy, Litigation, and Enforcement Revolving Trust Fund.*

D. The Attorney General may recover reasonable expenses incurred in investigating and preparing the case, including attorney fees, in any action initiated under this chapter.

E. Nothing in this chapter shall be construed as providing the basis for, or be subject to, a private right of action for violations of this chapter or under any other law.

2. That § 59.1-585 of the Code of Virginia is repealed.