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January 22, 2020

The Honorable Reuven Carlyle
Chairman, Environment, Energy & Technology Committee
Washington State Senate
233 John A. Cherberg Building
Olympia, WA 98504-0436

Re: SB 6281, Washington Privacy Act

Dear Senator Carlyle,

On behalf of Consumer Federation of America (CFA), an association of nonprofit consumer organizations across the country representing millions of consumers, including in your state, and the Electronic Privacy Information Center (EPIC), a leading privacy advocacy organization founded in 1994, we want to thank you for your willingness to gather input from stakeholders as you work to develop effective legislation to protect Washingtonians' privacy. The Washington Privacy Act provides the opportunity to establish basic privacy protections and to improve on the initial step taken by the state of California.

CFA and EPIC applaud you for making some recent improvements to the bill. For instance, the requirement to authenticate consumers who wish to opt out of the sale of their personal data has been removed, since it is not necessary. The "right to cure," which would have impaired the Attorney General's ability to enforce the law, has also been eliminated. The definition of "deidentified data" has been improved and provisions against discrimination have been enhanced.

There is still much to be done, however, to ensure that Washingtonians are treated fairly by companies that seek to profit from the use of their personal data. The guiding principle should be to preserve individuals' fundamental right to privacy, as expressly enshrined in the Washington constitution, while allowing reasonable provisions for commercial use of their data.

In that spirit, CFA and EPIC would like to make the following requests and suggestions:

1. **Remove facial recognition from the bill.** As you know, there is significant concern about the use of this technology in both the commercial sector and government. Numerous studies have shown that it can produce inaccurate results, often biased against people of color. There are also serious questions about how feasible it is to rely on consumer consent, especially in public settings. Organizations across the country are now urging a ban on face surveillance. We cannot support the legislation if the aim is to facilitate the deployment of face surveillance.
2. **Provide a private right of action for Washingtonians.** Even if its resources are increased, the state Attorney General will never be able to bring each and every case that that merits action for violating your constituents' privacy rights. Private rights of action enable individuals to obtain redress and are also an effective tool for changing errant business behavior, for the benefit of all. The ability to enforce one's rights is fundamental to American justice. We cannot support legislation that prevents Washingtonians from seeking the justice they deserve.
3. **Cover selling consumers' personal data to affiliates.** There is no reason to treat them differently than third parties. There is nothing in the current language that even limits what affiliates can do with the data to what the first party intends to do with it.
4. **Include "or terms of" in the definition of "decisions that produce legal effects."** It is not enough to simply say that consumers cannot be denied certain essential products and services if the terms of those deals can be made too onerous or disadvantageous.
5. **Include transferring individuals' personal data as part of a merger, bankruptcy, etc. in the definition of "sale."** This is needed to prevent the buyer from being able to retroactively change the treatment of the data.
6. **Include individuals' economic situation in the definition of "sensitive data."** This can be just as sensitive as one's race, ethnicity and other personal characteristics.
7. **Remove exemptions for businesses that are covered by HIPPA, GLBA and COPPA.** Each of these federal statutes allows states to provide stronger protections for financial, health and children's information, respectively, as coverage under this bill would do.
8. **Redefine secondary use.** Secondary use is generally thought of as any use of personal data that that is not necessary to fulfill the consumer's request or for other truly operational purposes such as fraud control. In this bill, however, it is treated as any use other than what the controller has stated in the privacy policy. As we all know, most individuals are unlikely to ever read the privacy policy, let alone understand it. To be a

meaningful distinction, secondary use should be those uses that individuals would not reasonably expect.

9. **Clarify requirements for consent.** Consent should be a separate action from any other actions that individuals might take in an agreement for goods or services.
10. **Enable individuals to opt out of ANY processing that is not necessary to fulfill their requests or for other truly operational purposes.** Regardless of what the bill considers “secondary use,” there is no reason why individuals’ opt out rights should be limited to sale, targeted advertising, or profiling in furtherance of decisions that produce legal effects. While offering granular choices should be allowed, individuals should also be able to opt-out of all unwanted and unnecessary uses in one action.
11. **Reinstate the requirement that the controller convey the consumers’ opt-out request to third parties to whom the data have been sold.** Individuals should not have to contact each of dozens, even hundreds of entities to which their data has been sold to ask them to stop using it.
12. **Include “profiling” in the disclosures required under section 8, (1) (b).** There is no reason why the controller should tell individuals that it sells their data to third parties or processes their data for targeted advertising but not reveal that it processes the data for profiling.
13. **Expand the nondiscrimination section in 8 (6) beyond processing that violates state or federal laws on discrimination.** The narrow language in the bill could result in gaps where current federal law does not provide adequate protection against unfair discrimination. We support the language that Consumer Reports suggested to you on the November 2019 version of the bill.
14. **Narrow the exemption in the nondiscrimination for loyalty programs.** Again, we support the language that Consumer Reports previously suggested, which is limited to rewards for repeat patronage of the first party and does not allow the sale of the data to third parties. The current language unjustifiably expands the exemption much too far.
15. **Restrict the ability of the controller to share the data with law enforcement to complying with a subpoena or other type of official order.** Language such as “to comply with an investigation” is far too broad to protect individuals’ rights against government surveillance.
16. **Impose accountability on the controller or processor that discloses personal data to a third party for that party’s actions.** Liability can’t be limited to instances where the controller or processor has “actual knowledge” that the party “intended” to violate the law. This would eliminate any incentive for the controller or processor to monitor

compliance with the restrictions it places on use of the data and allow situations like Facebook/Cambridge Analytica to happen with impunity.

Thank you very much for considering our views on this important legislation. We would be happy to discuss our requests and recommendations further and to provide any other information that would be of assistance to you and your committee.

Sincerely yours,

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Consumer Federation of America

Mary Stone Ross
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