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S. 4434

To protect the privacy of personal reproductive or sexual health information, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 16, 2022

Ms. HIRONO (for herself, Mr. WYDEN, Mrs. GILLIBRAND, Ms. SMITH, Mr. WHITEHOUSE, Mr. BLUMENTHAL, Ms. BALDWIN, Mr. BROWN, Ms. DUCKWORTH, Ms. KLOBUCHAR, and Mr. BOOKER) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To protect the privacy of personal reproductive or sexual health information, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''My Body, My Data Act of 2022''.

SEC. 2. MINIMIZATION.

(a) MINIMIZATION OF COLLECTING, RETAINING, USING, AND DISCLOSING.—A regulated entity may not

collect, retain, use, or disclose personal reproductive or sexual health information except—

(1) with the express consent of the individual to whom such information relates; or

(2) as is strictly necessary to provide a product or service that the individual to whom such information relates has requested from such regulated entity.

(b) MINIMIZATION OF EMPLOYEE ACCESS.—A regulated entity shall restrict access to personal reproductive or sexual health information by the employees or service providers of such regulated entity to such employees or service providers for which access is necessary to provide a product or service that the individual to whom such information relates has requested from such regulated entity.

SEC. 3. RIGHT OF ACCESS AND DELETION.

(a) RIGHT OF ACCESS.—

(1) IN GENERAL.—A regulated entity shall make available a reasonable mechanism by which an individual, upon a verified request, may access—

(A) any personal reproductive or sexual health information relating to such individual that is retained by such regulated entity, including—

(i) in the case of such information that such regulated entity collected from third parties, how and from which specific third parties such regulated entity collected such information; and

(ii) such information that such regulated entity inferred about such individual; and

(B) a list of the specific third parties to which such regulated entity has disclosed any personal reproductive or sexual health information relating to such individual.

(2) FORMAT.—A regulated entity shall make the information described in paragraph (1) available in both a human-readable format and a structured, interoperable, and machine-readable format.

(b) RIGHT OF DELETION.—A regulated entity shall make available a reasonable mechanism by which an individual, upon a verified request, may request the deletion of any personal reproductive or sexual health information relating to such individual that is retained by such regulated entity, including any such information that such regulated entity collected from a third party or inferred from other information retained by such regulated entity.

(c) GENERAL PROVISIONS.—

(1) REASONABLE MECHANISM DEFINED.—In this section, the term ''reasonable mechanism'' means, with respect to a regulated entity and a right under this section, a mechanism that—

(A) is equivalent in availability and ease of use to that of other mechanisms for communicating or interacting with such regulated entity; and

(B) includes an online means of exercising such right.

(2) TIMELINE FOR COMPLYING WITH REQUESTS.—A regulated entity shall comply with a verified request received under this section without undue delay but not later than 15 days after the date on which such regulated entity receives such verified request.

(3) FEES PROHIBITED.—A regulated entity may not charge a fee to an individual for a request made under this section.

(4) RULES OF CONSTRUCTION.—Nothing in this section shall be construed to require a regulated entity to—

(A) take an action that would convert information that is not personal information into personal information;

(B) collect or retain personal information that such regulated entity would otherwise not collect or retain; or

(C) retain personal information longer than such regulated entity would otherwise retain such information.

SEC. 4. PRIVACY POLICY.

(a) POLICY REQUIRED.—A regulated entity shall maintain a privacy policy relating to the practices of such regulated entity regarding the collecting, retaining, using, and disclosing of personal reproductive or sexual health information.

(b) PUBLICATION REQUIRED.—If a regulated entity has a website, such regulated entity shall prominently publish the privacy policy required by subsection (a) on such website.

(c) CONTENTS.—The privacy policy required by subsection (a) shall be clear and conspicuous and shall contain, at a minimum, the following:

(1) A description of the practices of the regulated entity regarding the collecting, retaining, using, and disclosing of personal reproductive or sexual health information.

(2) A clear and concise statement of the categories of such information collected, retained, used, or disclosed by the regulated entity.

(3) A clear and concise statement of the purposes of the regulated entity for the collecting, retaining, using, or disclosing of such information.

(4) A list of the specific third parties to which the regulated entity discloses such information, and a clear and concise statement of the purposes for which the regulated entity discloses such information, including how the information may be used by each such third party.

(5) A list of the specific third parties from which the regulated entity has collected such information, and a clear and concise statement of the purposes for which the regulated entity collects such information.

(6) A clear and concise statement describing the extent to which individuals may exercise control over the collecting, retaining, using, and disclosing of personal reproductive or sexual health information by the regulated entity, and the steps an individual must take to implement such controls.

(7) A clear and concise statement describing the efforts of the regulated entity to protect personal

reproductive or sexual health information from unauthorized disclosure.

SEC. 5. ENFORCEMENT.

(a) ENFORCEMENT BY FEDERAL TRADE COMMISSION.—

(1) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—A violation of this Act or a regulation promulgated under this Act shall be treated as a violation of a regulation under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)) regarding unfair or deceptive acts or practices.

(2) POWERS OF COMMISSION.—Except as provided in section 6(7)(A)(ii), the Commission shall enforce this Act and the regulations promulgated under this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act, and any regulated entity that violates this Act or a regulation promulgated under this Act shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act.

(3) RULEMAKING AUTHORITY.—The Commission may promulgate regulations under section 553 of title 5, United States Code, to implement this Act.

(b) ENFORCEMENT BY INDIVIDUALS.—

(1) IN GENERAL.—Any individual alleging a violation of this Act or a regulation promulgated under this Act may bring a civil action in any court of competent jurisdiction.

(2) RELIEF.—In a civil action brought under paragraph (1) in which the plaintiff prevails, the court may award—

(A) an amount not less than $100 and not greater than $1,000 per violation per day, or actual damages, whichever is greater;

(B) punitive damages;

(C) reasonable attorney's fees and litigation costs; and

(D) any other relief, including equitable or declaratory relief, that the court determines appropriate.

(3) INJURY IN FACT.—A violation of this Act, or a regulation promulgated under this Act, with respect to personal reproductive or sexual health information constitutes a concrete and particularized in-

jury in fact to the individual to whom such information relates.

(4) INVALIDITY OF PRE-DISPUTE ARBITRATION AGREEMENTS AND PRE-DISPUTE JOINT ACTION WAIVERS.—

(A) IN GENERAL.—Notwithstanding any other provision of law, no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect to a dispute arising under this Act.

(B) APPLICABILITY.—Any determination as to whether or how this paragraph applies to any dispute shall be made by a court, rather than an arbitrator, without regard to whether such agreement purports to delegate such determination to an arbitrator.

(C) DEFINITIONS.—For purposes of this paragraph:

(i) PRE-DISPUTE ARBITRATION AGREEMENT.—The term ''pre-dispute arbitration agreement'' means any agreement to arbitrate a dispute that has not arisen at the time of the making of the agreement.

(ii) PRE-DISPUTE JOINT-ACTION WAIVER.—The term ''pre-dispute joint-action waiver'' means an agreement that would prohibit a party from participating in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

SEC. 6. DEFINITIONS.

In this Act:

(1) COLLECT.—The term ''collect'' means, with respect to personal reproductive or sexual health information, for a regulated entity to obtain such information in any manner.

(2) COMMISSION.—The term ''Commission'' means the Federal Trade Commission.

(3) DISCLOSE.—The term ''disclose'' means, with respect to personal reproductive or sexual health information, for a regulated entity to release, transfer, sell, provide access to, license, or divulge such information in any manner to a third party or government entity.

(4) EXPRESS CONSENT.—

(A) IN GENERAL.—The term ''express consent'' means, with respect to the collecting, retaining, using, or disclosing of personal reproductive or sexual health information, informed, opt-in, voluntary, specific, and unambiguous written consent (which may include written consent provided by electronic means) to such collecting, retaining, using, or disclosing of such information.

(B) EXCLUSIONS.—The term ''express consent'' does not include any of the following:

(i) Consent secured without first providing to the individual a clear and conspicuous disclosure, apart from any privacy policy, terms of service, terms of use, general release, user agreement, or other similar document, of all information material to the provision of consent.

(ii) Hovering over, muting, pausing, or closing a given piece of content.

(iii) Agreement obtained through the use of a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision making, or choice.

(5) PERSONAL INFORMATION.—The term ''personal information'' means information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular individual.

(6) PERSONAL REPRODUCTIVE OR SEXUAL HEALTH INFORMATION.—The term ''personal reproductive or sexual health information'' means personal information relating to the past, present, or future reproductive or sexual health of an individual, including—

(A) efforts to research or obtain reproductive or sexual information services or supplies, including location information that might indicate an attempt to acquire or receive such information services or supplies;

(B) reproductive or sexual health conditions, status, diseases, or diagnoses, including pregnancy, menstruation, ovulation, ability to conceive a pregnancy, whether such individual is sexually active, and whether such individual is engaging in unprotected sex;

(C) reproductive- and sexual-health-related surgeries or procedures, such as termination of a pregnancy;

(D) use or purchase of contraceptives, birth control, or any medication related to reproductive health, including abortifacients;

(E) bodily functions, vital signs, measurement, or symptoms related to menstruation or pregnancy, such as basal temperature, cramps, bodily discharge, or hormone levels;

(F) any information about diagnoses or diagnostic testing, treatment, medications, or the use of any product or service relating to the matters described in subparagraphs (A) through (E); and

(G) any information described in subparagraphs (A) through (F) that is derived or extrapolated from non-health information (such as proxy, derivative, inferred, emergent, or algorithmic data).

(7) REGULATED ENTITY.—

(A) IN GENERAL.—The term ''regulated entity'' means any entity (to the extent such entity is engaged in activities in or affecting commerce (as defined in section 4 of the Federal Trade Commission Act (15 U.S.C. 44))) that is—

(i) a person, partnership, or corporation subject to the jurisdiction of the Commission under section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)); or

(ii) notwithstanding section 4, 5(a)(2), or 6 of the Federal Trade Commission Act (15 U.S.C. 44; 45(a)(2); 46) or any jurisdictional limitation of the Commission—

(I) a common carrier subject to the Communications Act of 1934 (47 U.S.C. 151 et seq.) and all Acts amendatory thereof and supplementary thereto; or

(II) an organization not organized to carry on business for its own profit or that of its members.

(B) EXCLUSIONS.—The term ''regulated entity'' does not include—

(i) an entity that is a covered entity, as defined in section 160.103 of title 45, Code of Federal Regulations (or any successor to such regulation), to the extent such entity is acting as a covered entity under the HIPAA privacy regulations (as

defined in section 1180(b)(3) of the Social Security Act (42 U.S.C. 1320d–9(b)(3)));

(ii) an entity that is a business associate, as defined in section 160.103 of title 45, Code of Federal Regulations (or any successor to such regulation), to the extent such entity is acting as a business associate under the HIPAA privacy regulations (as defined in such section 1180(b)(3)); or

(iii) an entity that is subject to restrictions on disclosure of records under section 543 of the Public Health Service Act (42 U.S.C. 290dd–2), to the extent such entity is acting in a capacity subject to such restrictions.

(8) SERVICE PROVIDER.—

(A) IN GENERAL.—The term ''service provider'' means a person who—

(i) collects, retains, uses, or discloses personal reproductive or sexual health information for the sole purpose of, and only to the extent that such person is, conducting business activities on behalf of, for the benefit of, under instruction of, and under contractual agreement with a regu-

lated entity and not any other individual or entity; and

(ii) does not divulge personal reproductive or sexual health information to any individual or entity other than such regulated entity or a contractor to such service provider bound to information processing terms no less restrictive than terms to which such service provider is bound.

(B) LIMITATION OF APPLICATION.—Such person shall only be considered a service provider in the course of activities described in subparagraph (A)(i).

(C) MINIMIZATION BY SERVICE PROVIDERS.—For purposes of compliance with section 2 by a service provider of a regulated entity, a request from an individual to such regulated entity for a product or service, and an express consent from such individual to such regulated entity, shall be treated as having also been provided to such service provider.

(9) THIRD PARTY.—The term ''third party'' means, with respect to the disclosing or collecting of personal reproductive or sexual health information, any person who is not—

(A) the regulated entity that is disclosing or collecting such information;

(B) the individual to whom such information relates; or

(C) a service provider.

SEC. 7. EXCEPTION FOR THE PUBLICATION OF NEWSWORTHY INFORMATION.

Nothing in this Act, or a regulation promulgated under this Act, shall apply with respect to personal reproductive or sexual health information that is collected, retained, used, or disclosed by a regulated entity for the publication of newsworthy information of legitimate public concern to the public, or to the collecting, retaining, using, or disclosing of such information by a regulated entity for that purpose, if such regulated entity has reasonable safeguards and processes that prevent the collecting, retaining, using, or disclosing of personal reproductive or sexual health information for commercial purposes other than the publication of newsworthy information of legitimate public concern.

SEC. 8. RELATIONSHIP TO FEDERAL AND STATE LAWS.

(a) FEDERAL LAW PRESERVATION.—Nothing in this Act, or a regulation promulgated under this Act, shall be construed to limit any other provision of Federal law, except as specifically provided in this Act.

(b) STATE LAW PRESERVATION.—

(1) IN GENERAL.—Nothing in this Act, or a regulation promulgated under this Act, shall be construed to preempt, displace, or supplant any State law, except to the extent that a provision of State law conflicts with a provision of this Act, or a regulation promulgated under this Act, and then only to the extent of the conflict.

(2) GREATER PROTECTION UNDER STATE LAW.—For purposes of this subsection, a provision of State law does not conflict with a provision of this Act, or a regulation promulgated under this Act, if such provision of State law provides greater privacy protection than the privacy protection provided by such provision of this Act or such regulation.

SEC. 9. SAVINGS CLAUSE.

Nothing in this Act shall be construed to limit the authority of the Commission under any other provision of law. Nothing in this Act, or a regulation promulgated under this Act, shall be construed to prohibit a regulated entity from disclosing personal reproductive or sexual health information to the Commission as required by law, in compliance with a court order, or in compliance with a civil investigative demand or similar process authorized under law.

SEC. 10. SEVERABILITY CLAUSE.

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by the invalidation.

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