

# Virginia Consumer Data Protection Act Workgroup

Presentation by the  
Office of the Attorney General of Virginia

July 12, 2021

# *Topics from SB 1392/HB 2307*

- Ability to Cure
- Funding for Enforcement
- Damages/Penalties/Expenses/Fees
- Education Campaign



## *Ability to Cure*

§ 59.1-579(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.*

## *Ability to Cure (cont'd)*

- Substantial up-front work to identify and confirm a violation may result in single-entity compliance and little else
- No industry-wide deterrence
- Some violations of the VCDPA cannot be cured
  - Data breaches
  - Sales of data
- Others are more amenable to cure
  - Deletions of data
  - Correct inaccuracies



## *Ability to Cure (cont'd)*

- Colorado Model:

*“Prior to any enforcement action pursuant to subsection (1)(a) of this section, the attorney general . . . must issue a notice of violation to the controller if a cure is deemed possible. If the controller fails to cure the violation within sixty days after receipt of the notice of violation, an action may be brought pursuant to this section.”*



## *Funding for Enforcement*

- Expected staffing requirements for VCDPA:
  - Two attorneys – develop specific subject matter expertise, evaluate claims, manage investigations, issue Civil Investigative Demands (“CIDs”), litigate CID enforcement, negotiate settlements, litigate enforcement measures, oversee compliance, litigate compliance enforcement
  - Two staff – process complaints, respond to consumers, track potential targets, conduct investigations, monitor compliance, support litigation at all stages
- Projected cost: Approx. \$415,000 per year



## ***Funding for Enforcement (cont'd)***

*§ 59.1-581. Consumer Privacy Fund.*

*There is hereby created in the state treasury a special nonreverting fund to be known as the Consumer Privacy Fund. The Fund shall be established on the books of the Comptroller. All civil penalties, expenses, and attorney fees collected pursuant to this chapter shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used to support the work of the Office of the Attorney General to enforce the provisions of this chapter, subject to appropriation.*

## *Funding for Enforcement (cont'd)*

- Proposed Fund: Consumer Privacy Fund
  - Starts from \$0; no ability to get enforcement off the ground
  - No ability to budget
  - Risk of underfunding and overfunding
  - Risk of agency capture
- Can we leverage existing structures rather than developing new ones? Yes.





## *Funding for Enforcement (cont'd)*

- Existing Fund: Regulatory, Consumer Advocacy, Litigation, and Enforcement Revolving Trust Fund (“Revolving Fund”)
  - Repository for collections (penalties, attorneys’ fees, costs, payments) recovered by the Consumer Protection Section
  - All amounts in excess of carryover (currently \$1.25 million for one-time expenses) deposited into the General Fund
  - Recent deposits: 2020 - \$5.9M, 2019 - \$22.4M, \$4.5M
  - Cost of Consumer Protection Section - \$2.7M



## *Funding for Enforcement (cont'd)*

- Recommendation: use current funding mechanism
  - Consumer Protection Section is already funded through General Fund dollars; VCDPA enforcement should be as well
  - The Section currently collects more than twice what it costs to operate in General Fund dollars
  - The Revolving Fund is an efficient and well-established mechanism for collecting funds and transferring them to appropriators
  - Eliminates risk of agency capture



## ***Damages/Penalties/Expenses/Fees***

- § 59.1-580(C): “If a controller or processor continues to violate this chapter following the cure period . . . or breaches an express written statement provided to the Attorney General, . . . the Attorney General . . . may seek . . . **civil penalties of up to \$7,500 for each violation** under this chapter.”
- § 59.1-580(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.”



## ***Damages/Penalties/Expenses/Fees (cont'd)***

- Currently left unaddressed are damages suffered by consumers as a result of a violation of the VCDPA
- With only Attorney General enforcement, consumers with damages traceable to violations of the VCDPA will be left without a remedy
- A potential solution would be to allow the Attorney General to seek actual damages on behalf of injured consumers
- Consumers would be responsible for providing evidence of such damages



## *Education Campaign*

- At the first meeting, it was suggested that the Office of the Attorney General take lead responsibility for educating businesses of their obligations under the VCDPA
- OAG connections extend through consumer and victim advocacy networks, not industry groups
- It would be unorthodox for an enforcement agent (as opposed to a regulatory agent or trade association) to assume a primary educational role
- Funding recommendations do not take into account education costs



## *Recommendations*

- Fund two attorney and two staff positions through General Funds
- Replace the Consumer Privacy Fund with the existing Revolving Fund
- Allow for the OAG to pursue actual damages to consumers, to the extent they exist
- Employ “ability to cure” for those violations in which a cure is possible
- OAG as a piece, but not lead, of an education campaign



# Questions?

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