



November 14, 2024

The Honorable Jeff Irwin
Michigan State Senate
Post Office Box 30036
Lansing, MI 48909

Re: SB 1082, Reproductive Health Data Privacy Act — SUPPORT IF AMENDED

Dear Senator Irwin,

Consumer Reports¹ writes to support, if amended, SB 1082, which seeks to extend long overdue privacy protections to some of our most personal and sensitive data: that relating to reproductive health. Currently, there are few reliable protections for this type of information, especially for such information falling outside the bounds of the federal Health Insurance Portability and Accountability Act (HIPAA). That said, we recommend that the drafters amend the bill's provisions on geofencing, data sales, and minimization in order to ensure that the bill works as intended to provide Michigan consumers with a high level of protection.

Recently, the Federal Trade Commission has prioritized using its existing consumer protection framework to pursue abuses of reproductive health data;² however, the FTC's legal theories have not yet been tested in court, and it is unclear whether the impending transition of Administrations will result in a change in emphasis. SB 1082 would offer consumers and businesses clarity that reproductive health data must be kept confidential and protected.

Concerns about reproductive health products and services sharing personal data are not just theoretical. A Consumer Reports investigation in 2020 showed that the five leading fertility apps

¹ Founded in 1936, Consumer Reports (CR) is an independent, nonprofit and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR advocates for laws and company practices that put consumers first. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today's consumers, and provides ad-free content and tools to 6 million members across the U.S.

² See, e.g. Federal Trade Commission, "FTC Sues Kochava for Selling Data that Tracks People at Reproductive Health Clinics, Places of Worship, and Other Sensitive Locations," (August, 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-kochava-selling-data-tracks-people-reproductive-health-clinics-places-worship-other>; Federal Trade Commission, "Ovulation Tracking App Premom Will be Barred from Sharing Health Data for Advertising Under Proposed FTC Order", (May 17, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ovulation-tracking-app-premom-will-be-barred-sharing-health-data-advertising-under-proposed-ftc>

all had significant privacy issues: many required users to provide their name and email address in order to function, others had confusing privacy policies that few consumers would understand, and all shared users' personal health data with advertising and marketing firms.³ A follow-up Consumer Reports investigation in 2022 found that while a handful of fertility apps did implement robust privacy protections to safeguard consumer data, the biggest companies still had not addressed many of the problems we had identified in our earlier study — including sharing personal fertility data with data brokers and other third-parties.⁴ And in an article published just today, researchers revealed that popular pregnancy and baby tracker app “What To Expect” has neglected to patch a critical security vulnerability that could easily allow nefarious actors to take over the accounts of users and expose their sensitive data.⁵ Together, these findings demonstrate that while it is possible to offer mobile app fertility services in a privacy-preserving way, companies are clearly not incentivized to do so by the market alone.

SB 1082 seeks to remedy this by requiring providers of reproductive health care services (appropriately defined to include the type of non-HIPAA covered fertility and period tracker apps discussed above) to provide baseline consumer rights, such as the right to access and delete reproductive health data, restricting their ability to collect and use reproductive health data (data minimization), creating specific limitations on the sale of reproductive health data, and prohibiting the practice of geofencing. Critically, the bill also currently includes a private right of action, which is key to ensuring that businesses are adequately incentivized to comply with the law and that consumers have alternate avenues of redress in the event that government enforcers (who tend to face significant resource constraints) do not take action on their complaints. Several similarly focused state efforts to protect sensitive categories of personal data also include this protection,⁶ which has proven to mitigate harmful business practices, such as forcing Facebook to stop its practice of automatically enrolling users into its face surveillance feature.⁷

³ Donna Rosato, What Your Period Tracker App Knows About You, Consumer Reports, (January 28, 2020), <https://www.consumerreports.org/health-privacy/what-your-period-tracker-app-knows-about-you-a8701683935/>.

⁴ Catherine Roberts, These Period Tracker Apps Say They Put Privacy First. Here's What We Found., Consumer Reports, (May 25, 2022), <https://www.consumerreports.org/health-privacy/period-tracker-apps-privacy-a2278134145/>.

⁵ Joseph Cox, Pregnancy Tracking App ‘What to Expect’ Refuses to Fix Issue that Allows Full Account Takeover, 404Media, (November 14, 2024), <https://www.404media.co/pregnancy-tracking-app-what-to-expect-refuses-to-fix-issue-that-allows-full-account-takeover-2/>

⁶ Washington My Health My Data Act, <https://app.leg.wa.gov/RCW/default.aspx?cite=19.373&full=true> D.C. CHIPPA, <https://oag.dc.gov/sites/default/files/2024-07/Consumer%20Health%20Information%20Privacy%20Protection%20Act%20of%202024.pdf>, Illinois BIPA, <https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004>

⁷ Jennifer Bryant, Facebook's \$650M BIPA settlement 'a make-or-break moment', IAPP, (March 5, 2021), <https://iapp.org/news/a/facebooks-650m-bipa-settlement-a-make-or-break-moment>

However, we recommend several amendments to ensure that this bill achieves its intended goals, including:

- ***Ban the Sale of Reproductive Health Data Outright***
 - Section 9 prohibits covered entities and service providers from selling reproductive health data without consent, and provides several conditions for valid consent, including that any consent to sell be separate and distinct from the consumer's consent to collect or process the data. While better than the alternative of allowing companies to sell data so long as they disclose it in their privacy policy (i.e. the status quo), we'd prefer to see a framework that bans the sale of reproductive health data outright. There is no valid public policy reason to allow this information to be sold or shared for targeted advertising, as it can really only harm consumers and undermine their trust in reproductive health services and tools. Notably, Section 5(4)(d)(ii), which allows disclosure of data to third-parties upon consent, would also need to be stricken.

We note that the current definition of “sale” does not currently provide for some of the reasonable exemptions typically found in state privacy laws (e.g. sharing data with service providers or third-parties to carry out specific requests from consumers). Adding these would clarify that the scope of restricted data sales includes only those unanticipated secondary purposes likely to harm consumers, thus reducing the need for a consent provision. We would be happy to work with the drafters to find the appropriate balance.

- ***Widen the applicability of the geofencing provisions***
 - Section 11 currently bans covered entities or service providers from implementing a geofence to surveil consumers seeking in-person reproductive health services. However, this misunderstands the threat model presented by geofencing, where it is often third-parties (e.g. data brokers, marketers, or political interest groups),⁸ rather than the providers themselves, that wish to surveil reproductive health seekers. The prohibition should be amended to apply to “any person” seeking to establish a geofence for one of the enumerated purposes.
- ***Close Loopholes in the Data Minimization Provision***
 - Section 5 restricts covered entities or service providers from collecting or processing reproductive health data unless it is necessary to provide a product, service, or service feature that the consumer has requested by signing up for the service or “otherwise contracting with the covered entity or service provider.”⁹ We

⁸ Office of U.S. Senator Ron Wyden, Wyden Reveals Phone Data Used to Target Abortion Misinformation at Visitors to Hundreds of Reproductive Health Clinic, (February 13, 2024), <https://www.wyden.senate.gov/news/press-releases/wyden-reveals-phone-data-used-to-target-abortion-misinformation-at-visitors-to-hundreds-of-reproductive-health-clinics>

⁹ Section 5(3)(a)

agree with the intent of this provision, which is ostensibly to prevent covered entities from collecting or using reproductive health data in unexpected ways. However, we are concerned that “contracting” with the covered entity may be interpreted to include agreeing to the company’s privacy policy, terms of service, or other boilerplate contract upon account creation. Such policies commonly contain extremely permissive data collection and use language, thus potentially undermining the intent of this provision to limit data use.

The drafters should instead include the data minimization standard from Maryland’s recently passed privacy law (currently the strongest standard in state privacy laws) that restricts collection and use of sensitive data to that which “is strictly necessary to provide or maintain a specific product or service requested by the individual to whom the reproductive health data pertains.” This will eliminate any ambiguity that companies can circumvent the spirit of the bill through a carefully drafted privacy policy.

- **Remove Constraints on the PRA**

- Section 13(2) stipulates that any consumer that “suffers a loss” as a result of a violation of this act may bring a civil action. Depending how this is interpreted by the courts, this provision may require consumers to show financial loss in order to assert a claim. Due to the sensitivity of the data in question, we pose that any violation of this act is inherently harmful to consumers and should be grounds for an action. We suggest that the provision be rewritten to read:

“An individual ~~who suffers a loss as a result of a violation of this act~~ may bring a civil action against the person that committed the violation to receive any of the following”

Thank you for your consideration. We look forward to continuing to work with you to ensure the strongest possible protections for consumer data.

Sincerely,

Matt Schwartz
Policy Analyst
Consumer Reports