Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 936 7329
http://www.microsoft.com/

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February 6, 2024

Senator Anne Carney, Chair
Representative Matt Moonen, Chair
The Maine Committee on Judiciary
100 State House Station
Augusta, ME 04333
Via Email: Anne.Carney@Legislature.maine.gov; Matthew.Moonen@legislature.maine.gov

RE: Comprehensive Privacy Bills – LD 1973 and LD 1977

Dear Chair Carney and Chair Moonen:

On behalf of Microsoft, I am writing to applaud you for taking up the issue of data privacy. While the past several decades have brought dramatic changes in technology, U.S. law has fallen behind much of the world by failing to address growing challenges to privacy. There is widespread skepticism today that consumers can enjoy the benefits of technology while retaining control of their personal data and protecting themselves from harm. For those reasons, we need new privacy laws.

At Microsoft, we have long taken the privacy of our customers seriously, and we have a long track record of supporting responsible, thoughtful reform. Indeed, we have been calling for comprehensive privacy laws in the United States since 2005. For those reasons, we support efforts to enact strong privacy protections in Maine.

We understand that the Committee on Judiciary is working through LD 1973 and LD 1977 in an effort to produce a single bill. We are providing comments on several issues that you are discussing in the interest of assisting the Committee's discussions.

1. The definition of "personal data"

How to define personal data is one of the most important issue in privacy legislation. Privacy bills must cover modern commercial data sets that are used to track consumers online, such as targeted advertising profiles. The definitions of "personal data" in both LD 1973 and LD 1977 are a good start. If the committee elects to use the definition in LD 1973, we recommend that it add specific examples of data that would be covered by the definition—these examples come from Colorado's privacy law and would help clarify that "personal data" includes identifiable data sets like targeted advertising profiles that are maintained in association with cookie IDs or other persistent unique identifiers: "'Personal data' means information that is linked or reasonably linkable to an identified or identifiable individual, such as a name, an identification number, specific geolocation data, or an online identifier." If the Committee elects to use the definition in LD 1977, we recommend that it delete the following reference: "alone or in combination with other information." That language is unnecessary because the definition would already cover data that is aggregated or combined such that it is "linked or reasonably

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linkable" to an identified or identifiable individual or a device. Further, the inclusion of that language is potentially vague and confusing because it could be interpreted to cover all data in the world, including non-personal data that a controller does not possess or control. With our recommended amendment, the definition in LD 1977 would provide as follows: "'Personal data' means any information, including derived data and unique identifiers, that is linked or linkable~~, alone or in combination with other information,~~ to an identified or identifiable individual or a device that identifies or is linked or reasonable linkable to an individual."

2. Pseudonymous data

LD 1973 contains an exemption for certain rights requests for "pseudonymous data." The term appears to have been deleted from LD 1977. We recommend that you follow the approach of LD 1977 and keep the term, "pseudonymous data," out of your bill. The term is unnecessary to include, which is why it is not contained in California's comprehensive privacy law, the California Consumer Privacy Act / California Privacy Rights Act. The term comes from the European Union's GDPR, where it is considered a security safeguard. But the term's inclusion in U.S. laws has generated confusion, and it could be misapplied by some to argue that modern online data sets that are used to track and target consumers on the Internet today, such as targeted advertising profiles, are somehow pseudonymous and therefore not subject to certain consumer rights in the bill. To be clear, those types of data sets should be covered by privacy laws. Accordingly, we recommend that you keep the term, "pseudonymous data," out of the bill.

3. Strengthen the deletion right

Both LD 1973 and LD 1977 would provide consumers with the right to "[d]elete personal data provided by, or obtained about, the consumer." We recommend that you strengthen that right, consistent with the deletion rights in the privacy laws enacted by Colorado and Oregon, to provide instead that consumers have "the right to delete personal data concerning the consumer." Doing so would ensure that the right applies not only to personal data that a controller collected from a consumer or from a third party, but to inferences that a company derives about a consumer and, for example, stores in targeted advertising profiles.

4. Data minimization requirements

Both bills include data minimization requirements that would be far more restrictive and severe regarding how companies can collect and use data than those that have been enacted in existing U.S. privacy laws. We recommend that the bills implement the data minimization requirements that were initially drafted in order to make them consistent with existing privacy laws (e.g., Connecticut's privacy law), and to avoid unintentionally precluding companies from using data to innovate. Alternatively, we would recommend that you add the following phrase to the data minimization requirement: "or consistent with a reasonable consumer's expectations considering the context in which personal data is processed, the relationship between the consumer and the controller, and the disclosures made to the

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consumer."

5. Consent requirements

We support taking a nuanced approach to consent and encourage you to adopt opt-in consent requirements for the processing of sensitive data, including precise geolocation information and biometrics. We also support requiring parental consent to process the personal data of children under the age of 13, as well as an opt-in consent requirement to process the personal data of minors for data sales or targeted advertising. Moreover, the definition of "consent" should be consistent with the GDPR, requiring an actual, affirmative choice made by consumers in response to clear and conspicuous information presented separately from other information—both bills' definitions would accomplish this.

Moreover, we support providing consumers with the right to opt-out of the processing of personal data for data sales, consequential profiling, and targeted advertising. We also support coupling the right to opt out regarding data sales and targeted advertising with a universal privacy signal or control to make it easier for consumers to exercise the right at one place and one time for all websites they visit on the Internet. Furthermore, we would encourage you to make the definitions of "sale" and "targeted advertising" consistent with the stronger privacy laws that have passed across the country, such as the laws in Connecticut, Colorado, New Hampshire, and Oregon (among others).

In short, we support your efforts to pass a comprehensive privacy law in Maine, and we look forward to working with you as the process unfolds. Thank you for allowing us to comment on this important issue.

Respectfully submitted,

Ryan P. Harkins
Senior Director, Public Policy
Microsoft Corporation