

March 22, 2023

Senator Ram Hinsdale, Chair
Senator Clarkson, Vice Chair
Senator Brock
Senator Cummings
Senator Harrison, Clerk

cc: Representative Priestley

Dear Chair Ram Hinsdale, Members of the Senate Economic Development Committee, and Representative Priestly,

Thank you for taking up this critical issue of consumer data privacy. Blue Cross and Blue Shield of Vermont shares your concerns about health care data privacy and personal health information (PHI). The House-passed version of the bill strengthened the language that addresses HIPAA-covered entities that are regulated by the Department of Financial Regulation, which we appreciate for the administrative simplification.

The only outstanding concern is the section that allows consumer right of action directly to the Superior Court without first seeking administrative remedies. We respectfully request an addition:

H.121 as passed the House, Section 2417(a)(2) reads as follows:

- A consumer harmed by a violation of this chapter or rules adopted pursuant to this chapter may bring an action in Superior Court for the greater of \$1,000 or actual damages, injunctive relief, punitive damages in the case of an intentional violation, and reasonable costs and attorney's fees if the consumer has notified the controller or process of the violation and the control or processor fails to cure the violation within 60 days following receipt of the notice of violation. When a dispute involves protected health information, a consumer must first exhaust their administrative remedies before taking action under this subsection (2).

Blue Cross VT would recommend adding the following either as a new subsection (3) or as indicated in red above to subsection (2).

- (3) When a dispute involves protected health information, a consumer must first exhaust their administrative remedies before taking action under subsection (2) above.

As written, when it comes to protected health information, any consumer could send Blue Cross VT a letter saying they think a health record isn't PHI, wait 60 days, and then file suit in Superior Court. Blue Cross VT or another entity could then end up litigating whether a record does or does not contain PHI. This could potentially be very expensive and waste court resources. If we specifically include the need to exhaust administrative remedies before filing suit, the risk for an expensive lawsuit is significantly reduced, because the determination of whether the data is PHI would be resolved prior to a court proceeding.

Finally, Blue Cross VT would ask the Committee to consider banning class or collective action on private right of action, to limit the ability undue litigious activity when this section is meant to protect individual's data privacy.

A suggestion would be adding a new subsection (d) that reads as follows:

- (d) Any action brought pursuant to this section must be on an individual basis and not as a class or collective action.

Thank you for considering these two changes.

Warmly,
Rebecca Copans
Blue Cross and Blue Shield of Vermont