



State Privacy and Security Coalition, Inc.

April 4, 2023

TO: Members, Assembly Privacy and Consumer Protection Committee

**SUBJECT: AB 331 (BAUER-KAHAN) AUTOMATED DECISION TOOLS
OPPOSE – AS AMENDED MARCH 30, 2023
SCHEDULED FOR HEARING – APRIL 11, 2023**

The undersigned organizations must strongly but respectfully **OPPOSE AB 331 (Bauer-Kahan)** as amended March 30, 2023, relating to the development and deployment of automated decision tools (ADTs). We agree that it is not only laudable, but critical to reduce bias and discrimination in consequential decisions impacting people. At the same time, we believe these issues exist whether the decision is human-made from start to finish, or a byproduct of using or incorporating new technologies in the decision-making process. We believe it is critical that any regulatory efforts proceed with precision, particularly as technology is still developing and has the potential to reduce, if not one day eliminate, such undesirable outcomes. There are many other beneficial uses of this technology that should not be overlooked. Just to name a few: they can automate repetitive tasks (such as entering data in two places at once), minimize errors by comparing current work to past work, enable quick approvals and access to credit that would otherwise take weeks, and protect consumers against fraudsters by assisting in the identification of uncharacteristic account activity.

Given the sweeping scope of this bill both in terms of the types of ADT captured and industries impacted, we are still working to compile feedback from our members on **AB 331**. Nonetheless, we have already identified a host of issues for your consideration with our shared objectives in mind. Our concerns largely center around the bill's private right of action and the too-narrow right to cure, around how the bill layers on top of several pieces of legislation and anticipated agency regulations on related topics by both the Civil Rights Department and the California Privacy Protection Agency, the scope of the bill, and unworkable obligations in relation to the mandated impact assessments and notice requirements.

Significant concerns around AB 331's private right of action, administrative penalties, and limited right to cure.

First and foremost, the inclusion of a private right of action for any violation of this bill is simply not feasible for such an important and growing technology. Compliance is not easy to achieve in areas where massive changes in public policy are sought and having a PRA in such a complicated, evolving state of law and technology – applied as broadly as this bill intends – is highly problematic and chilling.

Take, for example, the California Consumer Privacy Act of 2018 (CCPA) and the amendments to that act by way of Proposition 24 in 2020, the California Privacy Rights Act. Five years since the passage of the CCPA, and two and a half years since the passage of Proposition 24, companies are doing their best to come into full compliance with the law – a process that has only been made more difficult by the California Privacy Protection Agency's significant delay in issuing full and final regulations. Big changes take time, not just for regulators and legislative bodies, but for the companies seeking to understand and operationalize

those changes in good faith. That is why the Legislature and voters wisely decided to limit any private right of action under the CCPA, relying in large part on administrative and civil enforcement by the Agency and the Attorney General.

Given the breadth of the bill and complexity of this topic, we urge the same restraint here. We also believe it critical do so, particularly with the lack of clarity around what constitutes a “violation”. In the context of an administrative action, the lack of clarity is concerning given the \$10,000 fine that would apply to each violation. Compare this to the data privacy law, which includes fines of not more than \$2,500 or, in the case of an intentional violation, not more than \$7,500. Such fines require no showing of actual harm to an individual either, which only compounds the problem based on what is ultimately considered to be a single violation.

As currently drafted, it is possible that a violation could constitute not only a failure to complete an impact assessment altogether, but could also be interpreted as any single deficiency within that impact assessment. Even then, it is unknown whether the number of violations is based on that single error, or by any single error multiplied by the number of individuals who were *potentially* impacted by the use of a particular type of ADT for which an assessment was required or who received an inadequate notice.

Take for example **AB 331’s** requirement that an impact assessment include an analysis of potential adverse impacts on the basis of sex, race, color, ethnicity, religion, age, national origin, limited English proficiency, disability, veteran status, or genetic information. (See proposed section 22756.1(a)(5).) If an analysis is completed, but a potential adverse impact is left out, but not with any intent or malice, is that a violation subject to a private right of action? By way of another example, the bill requires a deployer to notify a natural person, at or before the time an ADT is used to make a consequential decision, that an ADT is being used to make or be a controlling factor in making the consequential decision. (See proposed section 22756.2.) What happens in the case of a hospital emergency room where prior notice simply is not possible? It is unclear to us what constitutes proper notice to avoid individual lawsuits alleging non-compliance. Ultimately, we are concerned that the potential for a private right of action as well as the steep fines will have a significant chilling effect on innovation in California and on access to important technology – including technologies that could reduce the instances of human bias and discrimination.

And while we support the opportunity to cure, conceptually, as drafted **AB 331’s** right to cure is inadequate and illusory. First, the bill authorizes a court to award to any prevailing plaintiff all of the following: compensatory damages, injunctive relief, declaratory relief, and reasonable attorney’s fees and litigation costs. The right to cure only applies to injunctive relief and it does not apply at all in the context of an administrative action. Even still, no company can realistically avail themselves of this right under **AB 331**, as it requires them to not only cure the noticed violation, but also provide the person giving the notice an express written statement that the violation has been cured *and that no further violations shall occur*. Due to the complexity and evolving nature of this technology, as well as the bill’s breadth and vagueness issues, it is unrealistic for company to be asked to sign a statement that they will never again violate this law.

Other active legislation and regulatory efforts on related topics opens the door for vast confusion and laws and regulations in conflict.

AB 331 is not the only measure related to automated decisions, artificial intelligence (AI) and issues around bias or discrimination when using such technology. To date, including **AB 331**, there are at least five bills¹ and two regulatory bodies grappling with the issue in one form or another.

Of note, Proposition 24 of 2020, required the California Privacy Protection Agency to issue regulations “governing access and opt-out rights related to businesses’ use of automated decision-making technology,

¹ AB 302 (Ward) seeks to require the California Department of Technology (CDT) to conduct an inventory of agency usage of high -risk automated decision systems. AB 313 (Dodd) seeks to have a new office of Artificial Intelligence to be created within CDT to “have the powers and authorities necessary to guide the design, use, or deployment of automated systems by a state agency to ensure that all AI systems are designed and deployed in a manner that is consistent with state and federal laws and regulations regarding privacy and civil liberties and that minimizes bias and promotes equitable outcomes for all Californians.” SB 721 (Becker) seeks to create the “California Interagency AI Working Group to deliver a report to the Legislature regarding AI, which is to include a recommendation of a definition of AI as it pertains to its use in technology for use in legislation – a term that this bill seeks to define as well.

including profiling and requiring businesses' response to access requirements to include meaningful information about the logic involved in these decisionmaking processes, as well as a description of the likely outcome of the process with respect to the consumer." (Civ. Code Sec. 1798.185.) As such, just last week, the Agency ended an informal, preliminary comment period on several topics, including automated decision-making, though it has yet to commence formal rulemaking on the topic or share any draft regulations with the public.

In addition to all of this, the Civil Rights Council within the Civil Rights Department (formerly, the Department of Fair Employment and Housing) is also working on regulating the use of AI and machine learning in connection with employment decision-making. The Council recently published draft modifications to their proposed employment regulations regarding "automated decision systems" in their effort to incorporate such technology into existing rules regulating California employment and hiring practices.

With all these moving parts, it is difficult to foresee how such laws and regulations will layer on top of one another and whether there will be conflicting public policy around the use of such tools and technologies. While some approaches suggest further study and understanding, others have proceeded toward regulating the technology, at times in overlapping contexts such as employment. Understandably, our members are alarmed by the likelihood of conflict and confusion at the conclusion of these efforts that are being run in parallel to each other, without any coordination or consideration of the other efforts underway.

AB 331's scope is inordinately broad and likely to impede efforts to actually reduce bias and discrimination as a result of overregulation.

Under its definition of an automated decision tool, **AB 331** regulates systems or services that use AI and that have been specifically developed and marketed to, or specifically modified to make, or be a controlling factor in making, consequential decisions. In turn, "consequential decision" means "a decision *or judgment* that has a legal, material, *or similarly significant effect* on an individual's life relating to the *impact of, access to, or the cost, terms or availability of any*" of 11 different subjects ranging from employment, education, health care, family planning, housing, essential utilities, financial services, criminal justice system, legal services, voting, or access to benefits or services or assignment of penalties (emphasis added). Any one of these could be the subject of specific legislation given the complexity of the issues and yet none of these are narrowly defined to make clear the types of decisions or judgments that are subject to these regulations.

Furthermore, where a consequential decision is made solely based on the output of an ADT, the deployer of that ADT must, "if technically feasible", accommodate the person's request to opt-out of the ADT and be subject to an "alternative selection process or accommodation," without any clarity as to what is considered "technically feasible" and without any limitations on what might be considered a reasonable accommodation request.

All of these issues become of even greater concern because the bill applies to businesses of *all* sizes that use ADTs. Consider if a small business uses a technology that can evaluate whether the business is ready to expand or needs additional employees to be hired. That presumably would be a use of ADT to make a consequential decision. Or consider if a small business relies on their calendars or appointment calendaring technology to determine if they can provide an appointment, service, or interview to an individual needing that service or job by a date certain. Have they then used ADT to make a consequential decision? If so, they would now be subject to **AB 331** and subject to potentially severe fines and possible litigation costs that can wipe them out.

AB 331's impact assessments and notice requirements raise significant issues.

There are a host of other concerns identified with **AB 331**, including in relation to its impact assessments and notice requirements. Consider the following:

- **AB 331** requires both deployers and developers to conduct assessments, separate and apart from one another. In each of these assessments, for example, they must provide "[a] description of the automated decision tool's outputs and how they are used to make, or be a controlling factor in making, a consequential decision." However, the former may not have the knowledge and expertise of the underlying technology created by the latter to understand all the varying uses aside

from their own intended use; and the latter may not have knowledge or control over the modification and potential uses of that modified technology by the former. Yet both are required to conduct a full assessment, including an analysis of the potential adverse impacts that could vary depending on those very factors.

- Impact assessments must be conducted not only annually of the same tool, but they must be made “as soon as feasible” with respect to any “significant update”. The former is undefined and the latter is ambiguous at best as it is defined to mean not only a new version or new release, but also any “other update” to an ADT that changes its use case, key functionality or expected outcomes. Additionally, the annual nature of these assessments will be burdensome, particularly for smaller businesses.
- While there is language in the bill protecting against the disclosure of trade secrets, there needs to be greater confidentiality protections in the bill, including not only an express exemption to the California Public Records Act, but also limiting the sharing among state agencies without any trigger. Given the obvious potential for litigation, insufficient confidentiality protections undermine candor and thoughtful assessments and creates concern over those assessments being misused as litigation bait.
- **AB 331** requires a deployer to provide notice, at or before the time an ADT is used to make a consequential decision, to a person that is the subject of the consequential decision that an automated decision tool is being used to make, or will be a controlling factor in making, the consequential decision. Consider if a hospital emergency room had to stop and notify individuals whose lives are at stake that they are deploying a triage tool to help identify the order of treatment given limited resources, and an opportunity to opt-out of that system. This is untenable and, simply put, results in dire outcomes that we do not believe this bill intends to have.

Ultimately, overregulation in this space can easily undermine many beneficial uses of ADT—including the ability develop and deploy these tools in a manner that can in fact reduce the instances and effects of human bias. To that end, we urge greater clarity, precision, and narrowing of the bill to avoid unintended consequences but, for all the aforementioned reasons, must **OPPOSE AB 331 (Bauer-Kahan)** in its current form.

Sincerely,



Ronak Daylami
Policy Advocate
on behalf of

American Financial Services Association
California Bankers Association
California Chamber of Commerce
California Credit Union League
California Financial Services Association
California Grocers Association
California League of Food Producers
California Manufacturers & Technology
Association
California Retailers Association

Card Coalition
Civil Justice Association of California
Computer & Communications Industry
Association (CCIA)
Insights Association
National Payroll Reporting Consortium
NetChoice
Software & Information Industry Association
State Privacy & Security Coalition, Inc.
TechNet

cc: Legislative Affairs, Office of the Governor
Estefani Avila, Office of Assemblymember Bauer-Kahan
Consultant, Assembly Privacy and Consumer Protection Committee
Liz Enea, Consultant, Assembly Republican Caucus

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