



June 8, 2020

Senator Rosalyn H. Baker
Chair of the Committee on Commerce, Consumer Protection, and Health
Hawaii Senate
Hawaii State Capitol, Room 230
415 South Beretania Street
Honolulu, HI 96813

Senator Jarrett Keohokalole
Chair of the Committee on Technology
Hawaii Senate
Hawaii State Capitol, Room 203
415 South Beretania Street
Honolulu, HI 96813

RE: Letter in Opposition to HI HB 2572, H.D. 2

Dear Chair Baker and Chair Keohokalole:

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country including many businesses in Hawaii. These companies range from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies, is responsible for more than 85 percent of the U.S. advertising spend and drives more than 80 percent of our nation's digital advertising spend. We and the companies we represent strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies.

While we fully support the legislature's intent to provide Hawaiians with strong privacy protections, we oppose HB 2572 in its current form. The bill includes terms that could significantly limit the availability of data in the marketplace and place economic strain on Hawaii at a time when the state's economy is already in the midst of difficult circumstances.¹ We caution the state legislature against enacting legislation that would detrimentally impact Hawaiians and the economy, particularly during the public health crisis presented by COVID-19 and the severe economic uncertainty facing the world at this time.

HB 2572 contains provisions that could harm consumers' ability to access products and services and exercise choice in the marketplace. The bill also contains particularly onerous terms surrounding digital data that could upend the Internet advertising ecosystem as we know it, disrupting consumers' online experience. While HB 2572 diverges in significant ways from other state privacy laws and privacy bills that are progressing through various state legislatures, it falls short of developing a system that will work well for consumers or enhance a fair and competitive marketplace. In certain respects, the bill attempts to adopt definitions and structural elements of the California Consumer Privacy Act ("CCPA"). However, the CCPA contains various internal inconsistencies and ambiguities, and as such it should not

¹ Hawaii Department of Business, Economic Development & Tourism, *COVID-19 and Hawaii's Economy*, located at <https://dbedt.hawaii.gov/economic/covid19/>.

be used as a basis for legislation in other states. For these reasons, we strongly oppose Hawaii’s HB 2572.²

I. The Data-Driven and Ad-Supported Online Ecosystem Benefits Consumers and Fuels Economic Growth

Throughout the past three decades, the U.S. economy has been fueled by the free flow of data. One driving force in this ecosystem has been data-driven advertising. Advertising has helped power the growth of the Internet for years by delivering innovative tools and services for consumers and businesses to connect and communicate. Data-driven advertising supports and subsidizes the content and services consumers expect and rely on, including video, news, music, and more. Data-driven advertising allows consumers to access these resources at little or no cost to them, and it has created an environment where small publishers and start-up companies can enter the marketplace to compete against the Internet’s largest players.

As a result of this advertising-based model, U.S. businesses of all sizes have been able to grow online and deliver widespread consumer and economic benefits. According to a March 2017 study entitled *Economic Value of the Advertising-Supported Internet Ecosystem*, which was conducted for the IAB by Harvard Business School Professor John Deighton, in 2016 the U.S. ad-supported Internet created 10.4 million jobs.³ Calculating against those figures, the interactive marketing industry contributed \$1.121 trillion to the U.S. economy in 2016, doubling the 2012 figure and accounting for 6% of U.S. gross domestic product.⁴

Consumers, across income levels and geography, embrace the ad-supported Internet and use it to create value in all areas of life, whether through e-commerce, education, free access to valuable content, or the ability to create their own platforms to reach millions of other Internet users. Consumers are increasingly aware that the data collected about their interactions on the web, in mobile applications, and in-store are used to create an enhanced and tailored experience. Importantly, research demonstrates that consumers are generally not reluctant to participate online due to data-driven advertising and marketing practices. Indeed, as the Federal Trade Commission noted in its recent comments to the National Telecommunications and Information Administration, if a subscription-based model replaced the ad-based model, many consumers likely would not be able to afford access to, or would be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.⁵ It is in this spirit—preserving the ad supported digital and offline media marketplace while helping to design appropriate privacy safeguards—that we provide these comments.

II. The Bill’s Definition of Personal Information for Breach Notification Purposes Extends Beyond Any State Law

HB 2572 would greatly expand the definition of “personal information” subject to the state’s data breach notification law by including identifiers in its scope.⁶ Rendering such identifiers subject to the state’s breach notification statute represents a massive expansion of breach notification requirements far

² HB 2572, 30th Legislature, Reg. Sess. (Haw. 2020) (hereinafter “HB 2572”).

³ John Deighton, *Economic Value of the Advertising-Supported Internet Ecosystem* (2017), located at <https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-2017-FINAL2.pdf>.

⁴ *Id.*

⁵ Federal Trade Commission, *In re Developing the Administration’s Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

⁶ HB 2572, Part II, § 2.

beyond what any other state has done before. Even the CCPA does not include information used to identify individuals across technology platforms in its scope of information subject to the data breach enforcement provisions in the law.⁷ Expanding Hawaii’s definition of “personal information” for data breach notification in this way would make Hawaii be out of step with other states and cause a vastly increased number of notices sent to consumers, thereby unnecessarily raising consumer alarm without providing any additional privacy protections.

The definition of “personal information” for the purposes of Hawaii’s breach notification statute should be comprised of data elements that could enable identity theft if misappropriated. Identifiers across technologies do not pose the same risks to consumers as other data elements that should rightly be included in the scope of breach notification requirements. We therefore recommend that you not alter the definition of personal information for breach notification purposes.

III. The Bill Would Severely Impede Internet Commerce

The bill would also require opt-in consent for any sale of “geolocation information” and “internet browser information,” defined broadly as “information from a person’s use of the internet,” including web browsing history, application usage history, origin and destination IP addresses, device identifiers, and the content of communications comprising Internet activity.⁸ Requiring an opt in to personal information sale is far different from other states’ approaches to personal information in the context of consumer privacy laws. If left uncorrected, HB 2752 would undermine the ad-supported Internet, crippling the online marketplace and resulting in a fractured experience for Hawaiian consumers.

Requiring opt-in consent for the sale of internet browser information and geolocation information as broadly defined would fundamentally change Hawaiians’ ability to access products and services they enjoy and expect through the Internet. This approach diverges from other states’ consumer privacy proposals, such as the CCPA and others that impose an opt out regime to data sales rather than an opt in regime. HB 2572 defines “sale” broadly as “selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means,” geolocation information or internet browser information to another business or a third party for monetary or other valuable consideration.⁹ As a result, any transfer of such data is likely to be treated as a “sale” under the bill, which provides no customary exemptions for service providers or other entities that businesses rely on for various processing activities, and which a consumer would reasonably expect to receive the information. Additionally, consumers would be inundated with requests for their consent to transfer internet browser information, thereby overwhelming them with a variety of notices and requests and causing significant consumer frustration.

Transfers of data over the Internet enable modern digital advertising, which subsidizes and supports the broader economy and helps to expose consumers to products, services, and offerings they want to receive. In a survey commissioned by the Digital Advertising Alliance, 90% of consumers stated that free content was important to the overall value of the Internet and 85% surveyed stated they prefer the existing ad-supported model, where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.¹⁰ The survey also found that consumers value the ad-supported content and services at almost \$1,200 a year.¹¹ The opt-in requirements of HB 2572 could

⁷ Cal. Civ. Code § 1798.150(a)(1).

⁸ HB 2572, Part III, § 4.

⁹ *Id.*

¹⁰ Zogby Analytics, Public Opinion Survey on Value of the Ad-Supported Internet (May 2016).

¹¹ Digital Advertising Alliance, Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth \$1,200/Year; 85% Prefer Ad-Supported Internet to Paid, PR Newswire (May 11, 2016).

destroy this model, which consumers have expressed that they value and would not want to see replaced. We therefore respectfully ask you to remove the opt-in consent requirements for “sales” of geolocation information and internet browser information.

* * *

We and our members support Hawaii’s commitment to provide consumers with enhanced privacy protections. However, we believe HB 2572 takes an approach that will severely harm the online economy without providing helpful privacy protections for consumers. We therefore respectfully ask you to reconsider the bill and update it to remove the terms we discussed in this letter so Hawaiians can continue to receive products, services, and offerings they value and expect over the Internet.

Thank you in advance for consideration of this letter.

Sincerely,

Dan Jaffe
Group EVP, Government Relations
Association of National Advertisers
202-269-2359

Alison Pepper
Executive Vice President, Government Relations
American Association of Advertising Agencies, 4A's
202-355-4564

Christopher Oswald
SVP, Government Relations
Association of National Advertisers
202-269-2359

David Grimaldi
Executive Vice President, Public Policy
Interactive Advertising Bureau
202-800-0771

David LeDuc
Vice President, Public Policy
Network Advertising Initiative
703-220-5943

Clark Rector
Executive VP-Government Affairs
American Advertising Federation
202-898-0089