February 10, 2020

The Honorable Rep. Timm Ormsby
Chair of the House Appropriations Committee
Washington House of Representatives
315 John L. O'Brien Building
Olympia, WA 98504

RE: Washington HB 2742

Dear Chair Ormsby:

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies, from small businesses to household brands, across every segment of the advertising industry. We write to express our deep concerns with HB 2742, as the bill, in its current form, could cause significant damage to Washington's economic competitiveness and innovation without providing commensurate privacy protection for consumers.[1]

Our organizations strongly support Washington's interest in protecting the privacy of its citizens. Although we recognize and appreciate the efforts made over the last year to update the state's privacy law to better protect consumers and provide more certainty for businesses, we believe the bill presently contains several provisions that are unclear, overly broad, or contrary to the privacy protections it intends, thus hurting both consumers and businesses alike.

For instance, HB 2742's private right of action could unleash a flood of frivolous litigation around technical or other non-substantive issues. In doing so, it could dramatically raise costs for Washington businesses, while creating inconsistent or contradictory regulatory requirements and failing to provide any meaningful privacy protections for consumers. We urge you to place that enforcement responsibility in the capable hands of the state's Attorney General, so all Washingtonians can rely on consistent and meaningful privacy protections.

In addition, the bill's definition of "sale" is overly broad, so it fails to accurately limit its effects to a defined set of data transfers. Instead, this definition is so far-reaching that it encompasses virtually any processing of personal data, even in the absence of personal information transfers. This expansive definition risks inappropriately preventing many beneficial, day-to-day business services that consumers like and expect to receive. The bill's definition of "sale" also should be further clarified to ensure that vital data exchanges that occur through the Internet and support non-targeted advertising activities are not subject to consumer requests to opt out of sale.

Legislation is at its strongest and most effective when it appropriately incentivizes regulated entities and is free from ambiguities that can cause business confusion and consumer mistrust. As further discussed in this letter, we respectfully request that you amend the bill's definition of "sale" and remove its private right of action. We believe these changes will better protect the privacy of residents of the state and will provide much needed clarity for businesses.

[1] HB 2742, Reg. Sess. (Wash. 2020) (hereinafter "HB 2742").

I. HB 2742's Private Right of Action Will Drive Frivolous Lawsuits That Hurt Innovation Without Helping Privacy

HB 2742 contains a private right of action with potential penalties that would punish companies that are good actors and have a chilling effect on Washington's economy without providing any significant benefits for consumer privacy.[2] The private litigant enforcement provisions and the extremely high potential penalties for violations represent an overly punitive scheme that will not effectively address privacy concerns.

The bill's private right of action would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing such private actions would flood the courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm. These penalty provisions are completely divorced from any connection to actual consumer harm.

A private right of action would expose businesses to extraordinary and potentially enterprise-threatening costs for technical violations of the bill rather than driving systemic and helpful changes to business practices. It would also encumber businesses' attempts to innovate by threatening companies with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies.

Beyond the staggering cost to Washington businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based on differing court outcomes. Overall, private rights of action would serve as a windfall to the plaintiff's bar without focusing on the business practices that actually harm consumers.

As an alternative and more reasonable approach, we request that the legislature place consumer data privacy enforcement responsibilities within the purview of the state Attorney General's office. Doing so would lead to equally strong outcomes for consumers while better enabling businesses to allocate funds to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements.

II. The Definition of Sale Should Focus on Exchanges of Personal Data Rather Than Unreasonably Limit Uses of Personal Data

HB 2742 defines "sale" broadly to encompass any processing of personal data by a controller for consideration from a third party.[3] As a result, any business use, collection, or storage of personal data is arguably covered by the bill's definition of sale.

This definition is so broad that it threatens to encompass virtually any business service using data that is offered to consumers and the market. In the event of a consumer opt out from the sale of their personal data, a covered entity under HB 2742 would seem to be required to cease processing such personal data altogether—even processing activities that involve no transfers of the personal data to any other parties.

Including mere processing activities in the definition of sale does not reflect reasonable consumer expectations, and our organizations believe that the Washington legislature does not intend to cover such a large range of data activities within the scope of HB 2742's definition of sale. We therefore encourage

[2] *Id*. at § 11(1).
[3] *Id*. at § 3(29).

you to update the definition by removing its "processing" component and by appropriately limiting it to exchanges or transfers of personal data for consideration.

III. Minor Clarifications to the Sale Definition Will Better Serve Consumers and Provide Needed Clarity for Businesses

HB 2742 would provide Washington residents with the right to opt out of "the processing of personal data concerning such consumer for purposes of targeted advertising, the sale of personal data, or profiling in furtherance of decisions that produce legal effects concerning a consumer or similarly significant effects concerning a consumer."[4] However, the bill does not clarify how the definitions of "targeted advertising" and "sale" work together, which could create confusion in the marketplace and for consumers when it comes to opt outs.

The term "targeted advertising" under the bill covers "displaying advertisements to a consumer where the advertisement is selected based on personal data obtained from a consumer's activities over time and across nonaffiliated web sites or online applications to predict such consumer's preference or interests."[5] The definition of targeted advertising explicitly *excludes* advertising: "(a) Based on activities within a controller's own web sites or online applications; (b) based on the context of a consumer's current search query or visit to a web site or online application; or (c) to a consumer in response to the consumer's request for information or feedback."[6]

The definition of sale, however, does not include a similar delineation.[7] Sale is defined broadly as "the exchange or processing of personal data by the controller for monetary or other valuable consideration from a third party."[8] This definition, in conjunction with a lack of a carve out for the advertising activities that are explicitly excluded from the definition of "targeted advertising", makes it unclear whether or not consumers can opt out of such activities by submitting a request to opt out of personal data sale. It is also not clear whether this opt out would cover essential ad operations that involve data exchanges – not for targeted advertising purposes – but for ad delivery, reporting, and ad fraud prevention.

We respectfully ask you to update the bill's definition of sale to clarify this ambiguity in the legislation. We ask you to alter the definition of the term "sale" so it clearly states that an opt out from sale would not apply to activities that are carved out from the definition of targeted advertising as well as essential ad operations.

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We and our members support Washington's commitment to provide consumers with enhanced privacy protections. However, we believe the bill would be dramatically improved by removing the private right of action and instead tasking the Attorney General with the responsibility of enforcing its terms. In addition, HB 2742's definition of "sale" could be further clarified so it appropriately covers exchanges of personal data alone and contains the same exemptions that are present in the bill's definition of "targeted advertising". Such updates would reduce ambiguity in the legislation, help to set concrete rules for businesses, and provide much-needed clarification regarding the scope of consumers' rights under the bill.

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[4] *Id*. at § 6(5).
[5] *Id*. at § 3(34).
[6] *Id*. at § 3(34)(a)-(c).
[7] *See id*. at § 3(29).
[8] *Id*.

Consumer privacy is best served when businesses that leverage data do so in accordance with clear and concrete laws that leave little room for misunderstanding, misinterpretation, and manipulation, and where appropriate, enforcement mechanisms incentivize improving company practices.

Thank you in advance for consideration of this request.

Sincerely,

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