



February 9, 2021

The Honorable Representative Logan Phillips
Chair of the House Committee on Technology
2300 N. Lincoln Blvd., Room 455
Oklahoma City, OK 73105

The Honorable Representative Danny Williams
Vice Chair of the House Committee on
Technology
2300 N. Lincoln Blvd., Room 504
Oklahoma City, OK 73105

RE: OPPOSITION TO Oklahoma Computer Data Privacy Act (HB 1602)

Dear Chair Phillips and Vice Chair Williams:

On behalf of the advertising industry, we provide the following comments on HB 1602, the Oklahoma Computer Data Privacy Act (“OCDPA”).¹ We and the companies we represent strongly believe consumers deserve meaningful privacy protections, but we are concerned that the extreme approach to privacy regulation taken by the OCDPA would severely restrict Oklahomans’ ability to access vital products and services and force companies to forego doing business in the state. **We ask the Oklahoma legislature to observe privacy bill models in other states and work to harmonize the OCDPA’s requirements with such models before advancing HB 1602 any further through the legislative process.**

If the Oklahoma legislature enacts the OCDPA in its current form, the state would be adopting the most onerous privacy law in the United States, with an effective date that is only slightly more than eight months away. Provisions in the bill would severely impede businesses from providing products and services to Oklahomans—particularly small businesses. The bill would make Oklahoma an unfriendly state for consumers and businesses alike.

We recognize that the OCDPA is based in part on the California Consumer Privacy Act (“CCPA”). However, the OCDPA materially differs from the CCPA in key areas that would make compliance extraordinarily costly and resource-intensive for businesses and could harm Oklahomans by restricting their access to products and services. Moreover, the OCDPA contains outdated definitions and provisions that were amended out of the CCPA or altered by regulation. OCDPA is using an out-of-date model of the CCPA as a starting point for its own state privacy legislation, thereby missing the valuable stakeholder and consumer input that went into amendments to the CCPA and the regulations implementing that law’s terms.

As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, 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 U.S. advertising expenditures, and drives more than 80 percent of our nation’s digital advertising spend. Our organizations believe in the importance of maintaining a thriving Internet and information driven economy, where robust innovation drives strong economic growth, employing millions of Americans and providing transformative benefits for consumers. It is vital for consumer privacy legislation to appropriately support these key goals.

We ask the Oklahoma legislature to carefully consider the unintended and negative impacts the OCDPA would have on businesses and consumers and how such impacts may harm consumers. Below

¹ HB 1602 (Okla. 2021), located at <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1602>.

we provide a non-exhaustive list of specific issues inherent in the present draft of the OCDPA. Our organizations have a number of other significant concerns with the bill as it's currently written, but we provide the key issues below for your consideration. We look forward to working with you, the House Committee on Technology, and the legislature as a whole to refine this legislation.

I. The OCDPA Should Be Harmonized With Existing Privacy Laws

The OCDPA contains requirements that differ from requirements in the CCPA that stand detrimentally to harm both Oklahomans and entities that do business in the state.

- A. To Prevent Excessive Litigation That Will Harm Businesses Without Benefitting Consumers, Enforcement of the OCDPA Should be Vested Solely in the Attorney General.** As presently drafted, the OCDPA enables private citizens to bring actions against covered entities for violations of the bill.² No other state that has passed privacy legislation has adopted this broad of an enforcement approach. Including a private right of action in the OCDPA would create a complex and flawed compliance system, likely flooding the state's courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations rather than focusing on actual consumer harm or providing tangible privacy benefits for consumers. The responsibility for enforcing violations of privacy laws should be vested in the Oklahoma Attorney General. HB 1602 should not include a private right of action so businesses are better able to allocate funds to developing processes, procedures, and plans to facilitate compliance with the new data privacy requirements set forth in the OCDPA.
- B. Opt-In Consent for Personal Information Sales as Proposed in the OCDPA Would Subject Consumers to Incessant Consent Requests, and Should Therefore Be Replaced with an Opt-Out Approach.** Oklahoma should not adopt a one-size fits all opt-in consent requirement for the sale of personal information.³ No other state has adopted such a requirement. This requirement would therefore create the most restrictive approach to privacy in the United States, thereby hindering legitimate businesses of all sizes and harming Oklahoma consumers. Opt-in consent requirements for sales of personal information would stifle competition and harm consumers by limiting their access to crucial online resources. We recommend that the legislature remove the opt-in consent requirements in the bill and instead provide Oklahomans the right to opt out of sales of personal information.
- C. The OCDPA Should Not Require Third Parties to Obtain Consumer Consent to Sell Personal Information.** The bill states that “[a] third party to whom a business has sold personal information... may not sell the information unless the consumer receives explicit notice of the potential sale and is provided the opportunity to, and in fact does, exercise the right to opt in to the sale....”⁴ This provision would restrict consumers from receiving myriad ad-supported digital products and services and would unreasonably burden third party businesses and harm competition. The provision should be struck from the OCDPA.
- D. The OCDPA's Definition of “Publicly Available” Differs Substantially From Widely-Accepted Definitions.** The OCDPA states that information is not publicly available if it is used for a purpose that is not compatible with the purpose for which it is publicly maintained, even though government records often do not fully identify the purposes for which the information is held.⁵ The definition of the term “publicly available” should be amended to cover information that is lawfully made available from federal, state, or local government records. This is one example of a term that was clarified by

² *Id.* at Section 27(C).

³ *Id.* at Section 14(C).

⁴ *Id.* at Section 14(E).

⁵ *Id.* at Section 2(15).

amendment under CCPA after significant input from stakeholders, but the amended term under CCPA perhaps unintentionally has not been carried through to the OCDPA.

E. The OCDPA Should Not Require Disclosure of Sale Recipients, and It Is Impractical and Unreasonable to Require the Disclosure of the Pro Rata Value of Personal Information. Under the OCDPA, businesses that sell personal information must provide a notice that “identifies the persons to whom the information will or could be sold” and provides “the pro rata value of the consumer’s personal information that is being sold,” among other disclosures. While most privacy laws, including the CCPA, require disclosure of the categories of third parties to whom personal information is sold, neither the CCPA nor any other consumer privacy law in the United States requires such specific and onerous disclosures. Requiring businesses to disclose the names of entities to whom they sell personal information could abridge confidentiality terms set forth in contracts with business partners, and a creates an environment where disclosures would need to be updated on a regular basis as business partners change. At the same time, listing specific company partners will overwhelm consumers without providing significant privacy gains. With respect to the disclosure requirement for the pro rata value of personal information, these are not specific valuations that are currently conducted, nor could they be conducted in a practical way at scale. Additionally, businesses value personal information differently, and requiring them to disclose a numeric value of such information in a notice would cause significant consumer confusion. These terms would add significantly to the length of a normal business privacy policy, thereby causing consumer notice fatigue rather than serving the goal of concisely advising consumers of important information about businesses’ data practices.

F. The OCDPA Should Not Enable Other Persons to Submit Requests on Consumers’ Behalf. The bill allows Oklahomans to authorize “another person” to opt out of the sale of personal information associated with them on their behalf.⁶ The bill provides no information about what steps a consumer must take to formally authorize another person to submit such requests, nor does it set forth any protections to ensure Oklahomans’ actual choices are reflected by the other person’s actions. To prevent fraudulent opt out requests and to ensure consumers’ true preferences are honored, the bill should only permit a consumer who is the subject of an opt out request to submit the request on their own behalf.

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

Despite OCDPA’s legislative findings assertion that data use is harmful to Oklahomans, research demonstrates that consumers and the U.S. economy derive tremendous benefit from the use and transfer of data. 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

⁶ *Id.* at Section 14(A).

created 10.4 million jobs.⁷ 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.⁸

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. In a September 2020 survey conducted by the Digital Advertising Alliance, 93 percent of consumers stated that free content was important to the overall value of the Internet and more than 80 percent 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.⁹ The survey also found that consumers value ad-supported content and services at \$1,403.88 a year, representing an increase of over \$200 in value since 2016.¹⁰

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.¹¹ It is in this spirit—preserving the ad-supported digital and offline media marketplace while helping to design appropriate privacy safeguards—that we provide the above comments.

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Thank you for your consideration of these comments. We look forward to working further with you on the OCDPA.

Sincerely,

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⁷ 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>.

⁸ *Id.*

⁹ Digital Advertising Alliance, *SurveyMonkey Survey: Consumer Value of Ad Supported Services – 2020 Update* (Sept. 28, 2020), located at https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/Consumer-Value-Ad-Supported-Services-2020Update.pdf.

¹⁰ *Id.*

¹¹ 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.