



February 15, 2021

The Honorable Senator Sharon Y. Moriwaki
Chair of the Hawaii Senate Committee on Government Operations
Hawaii State Capitol, Room 223
415 S. Beretania St.
Honolulu, HI 96813

The Honorable Senator Donovan M. Dela Cruz
Vice Chair of the Hawaii Senate Committee on Government Operations
Hawaii State Capitol, Room 208
415 S. Beretania St.
Honolulu, HI 96813

RE: Letter in Opposition to HI SB 1009

Dear Chair Moriwaki and Vice Chair Dela Cruz:

On behalf of the advertising industry, we provide the following comments on Hawaii SB 1009.¹ While we support the legislature's intent to provide Hawaiians with strong privacy protections, we oppose SB 1009 in its current form. The bill would place economic strain on Hawaii at a time when the state's economy is already in the midst of difficult circumstances.² 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 economic uncertainty facing the country at this time.

SB 1009 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. SB 1009 diverges in significant ways from other state privacy laws and privacy bills that are progressing through various state legislatures, as well as state privacy laws that have already been enacted such as the California Consumer Privacy Act of 2018 ("CCPA"). The bill falls short of developing a system that will work well for consumers or enhance a fair and competitive marketplace.

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 expenditures. We and the companies we represent strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. We look forward to working with the Committee as it considers this legislation.

¹ SB 1009, 30th Legislature, Reg. Sess. (Haw. 2021) (hereinafter "SB 1009"), located [here](#).

² Hawaii Department of Business, Economic Development & Tourism, *COVID-19 and Hawaii's Economy*, located at <https://dbedt.hawaii.gov/economic/covid19/>.

I. The Bill Would Severely Impede Internet Commerce

SB 1009 would require explicit consent for any sale or offering for sale of “geolocation information” or “Internet browser information.”³ “Sale” is defined as virtually any transfer of such information to another business or third party for monetary or other valuable consideration.⁴

Requiring explicit consent for the sale of Internet browser information and geolocation information would fundamentally change Hawaiians’ ability to access products and services they enjoy and expect through the Internet. If left uncorrected, SB 1009 would adopt the most aggressive privacy law approach in the United States, undermine the ad-supported Internet, cripple the online marketplace, and create a fractured online experience for Hawaiian consumers. SB 1009 diverges from other states’ consumer privacy regimes and proposals, such as the CCPA and others, that grant consumers a right to opt out of personal information sales rather than imposing an opt in consent regime. SB 1009’s definition of sale is similarly broad, and as a result, any transfer of “geolocation information” or “internet browser information” 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, under the bill’s onerous terms, consumers would be inundated with requests for 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. Digital advertising enables online publishers to offer content, news, services and more to consumers for free or at a low cost. 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.⁵ 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 2016.⁶ The opt-in requirements of SB 1009 could 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 in SB 1009.

II. The Bill Should Vest Enforcement in the Attorney General Alone and Should Not Include a Private Right of Action

SB1009 would insert its proposed opt-in consent requirements for sales of geolocation information and Internet browser information into Chapter 481B of the Hawaii Code, the state’s Unfair and Deceptive Practices statute.⁷ This statute deems any violation of the chapter to be “an

³ SB 1009, Part III, § 4.

⁴ *Id.*

⁵ DAA, *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.

⁶ *Id.*

⁷ SB 1009, Part III, § 4.

unfair or deceptive act or practice” and appears to enable individual consumers to bring private actions based on such unfair or deceptive acts or practices.⁸ We strongly believe that the responsibility for enforcing violations of privacy laws should be vested in the state alone, and SB 1009 should not permit individuals to bring private lawsuits for violations.

Incorporating a private right of action in SB 1009 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood Hawaii’s courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm. Private right of action provisions are completely divorced from any connection to actual consumer harm and provide consumers little by way of protection from detrimental data practices.

Additionally, including a private right of action in SB 1009 would have a chilling effect on the state’s economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of law. Private litigant enforcement provisions and related potential penalties for violations represent an overly punitive scheme that do not effectively address consumer privacy concerns or deter undesired business conduct. A private right of action would expose covered entities to extraordinary and potentially enterprise-threatening costs for technical violations of law rather than drive systemic and helpful changes to business practices. It would also encumber covered entities’ attempts to innovate by threatening them with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies.

Beyond the staggering cost to Hawaiian businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based on differing court outcomes. Overall, a private right of action would serve as a windfall to the plaintiff’s bar without focusing on the business practices that actually harm consumers. We therefore encourage legislators to make explicitly clear that SB 1009 would not create a private right of action and instead vests enforcement responsibility with the state Attorney General alone. This adjustment would lead to strong outcomes for consumers while better enabling entities covered by the bill to allocate funds to developing processes, procedures, and plans to facilitate compliance with the new data privacy requirements set forth in SB 1009.

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

SB 1009 would greatly expand the definition of “personal information” subject to the state’s data breach notification law by including identifiers in its scope.⁹ “Identifier” is defined as “a common piece of information related specifically to an individual, that is commonly used to identify that individual across technology platforms, including a first name or initial, and last name; a user name for an online account; a phone number; or an email address.” This definition is drafted so broadly that it could be read to include common pseudonymous advertising identifiers that enable the modern functionality of the Internet as we know it, such as IP addresses, cookie identifiers, pixel tags, and others.

⁸ Haw. Rev. Stat. §§ 481B-4; 480-2(e).

⁹ SB 1009, Part II, § 2.

Rendering such identifiers subject to the state's breach notification statute represents a massive expansion of breach notification requirements far beyond what any other state has done. Even the CCPA does not include information used to identify individuals across technology platforms in the scope of information subject to the data breach enforcement provisions in the law.¹⁰ Expanding Hawaii's definition of "personal information" for data breach notification in this way would render Hawaii out of step with other states and, given the common use of such benign data types, it would cause a vastly increased number of breach notices sent to consumers in the state, 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 technology platforms 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 refrain from altering the definition of personal information for breach notification purposes in SB 1009.

IV. 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.¹¹ 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.¹²

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 comments to the National Telecommunications and Information Administration, if a

¹⁰ Cal. Civ. Code § 1798.150(a)(1).

¹¹ 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>.

¹² *Id.*

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.¹³ 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.

* * *

We and our members support Hawaii’s commitment to provide consumers with enhanced privacy protections. However, we believe SB 1009 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,

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¹³ 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.