March 9, 2021

The Honorable Rep. Fiona McFarland
1101 The Capitol
402 South Monroe Street
Tallahassee, FL 32399-1300

The Honorable Rep. Bob Rommel
Chair of the House Regulatory Reform Subcommittee
303 House Office Building
402 South Monroe Street
Tallahassee, FL 32399-1300

The Honorable Rep. Anthony Rodriguez
Vice Chair of the House Regulatory Reform Subcommittee
315 House Office Building
402 South Monroe Street
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The Honorable Rep. Anna Eskamani
Ranking Member of the House Regulatory Reform Subcommittee
1402 The Capitol
402 South Monroe Street
Tallahassee, FL 32399-1300

RE: Letter in Opposition to Florida HB 969

Dear Rep. McFarland, Rep. Rommel, Rep. Rodriguez, and Rep. Eskamani:

On behalf of the advertising industry, we oppose Florida HB 969,[1] and we offer these comments summarizing our concerns with the proposed legislation. We appreciate your willingness to consider these points so close to the hearing of the bill. We and the companies we represent, many of whom are headquartered or do substantial business in Florida, strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, HB 969 contains provisions that could hinder Floridians' access to valuable ad-supported online resources, impede their ability to exercise choice in the marketplace, and harm businesses of all sizes that support the economy. If enacted, HB 969 would take an approach to privacy regulation that is out of step with privacy laws in other jurisdictions and in a number of instances would be counterproductive. In addition, the bill includes a private right of action, which would serve to threaten innovation while creating a windfall for the plaintiff's bar without providing any real protection for consumers from privacy harms.

To help ensure Floridians can continue to reap the benefits of a robust ad-supported online ecosystem and exercise choice in the marketplace, we recommend that the Florida legislature undertake a study of available approaches to regulating data privacy before moving forward with enacting the onerous, and in some cases, outdated provisions set forth in HB 969. As presently written, HB 969 falls short of creating a regulatory system that will work well for Florida consumers or businesses.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. 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

[1] HB 969 (Fla. 2021) (hereinafter "HB 969"), located here.

spend, and drives more than 80 percent of our nation's digital advertising expenditures. We look forward to continuing to engage with the House Regulatory Reform Subcommittee ("Subcommittee") as it considers HB 969.

I. Florida Should Not Model Its Approach Off of Outdated and Confusing Privacy Standards

Though HB 969 appears to draw many of its provisions from the California Consumer Privacy Act of 2018 ("CCPA"), the bill does not take into account many updates and attempted clarifications to the CCPA that followed its initial passage. The CCPA was amended more than five times after its enactment in June 2018, and the California Attorney General revised the regulations implementing the law four times after initially publishing draft regulations in October 2019. Many facets of the confusing and operationally complex law are still not fully tested or fleshed out. Moreover, the CCPA is not even the most up-to-date privacy law in the state, as the California Privacy Rights Act of 2020 was recently enacted, thereby yet again materially amending the law. Florida should not adopt an outdated, confusing, and burdensome legal regime when there are more clear and effective ways to foster meaningful privacy protections for Florida consumers.

The CCPA is confusing and burdensome for both consumers and businesses. Efforts to emulate that regime in Florida will significantly and disproportionately impact the ability of small and mid-size businesses and start-up companies to operate successfully in the state. A standardized regulatory impact assessment of the CCPA estimated *initial* compliance costs at 55 billion dollars.[2] This amount did not take into account ongoing compliance expenses and needed resource allotments outside of the costs to businesses to bring themselves into initial compliance. Additionally, that same report estimated that businesses with less than 20 employees would need to spend $50,000 each to begin their CCPA compliance journey, and businesses with less than 50 employees would need to spend approximately $100,000 each.[3] At a time when our country is facing extremely difficult economic realities, adding significant regulatory burdens to small businesses could harm the state's economy without appropriately protecting consumer privacy. Florida should reconsider implementing outdated provisions of the CCPA, that now have been supplanted, as foundational aspects of its own privacy bill.

II. HB 969 Should Not Permit Others to Exercise Floridians' Privacy Rights

HB 969 would permit a consumer to "authorize another person to opt-out of the sale or sharing of the consumer's personal information on the consumer's behalf" and require a business to comply with such an opt out request pursuant to rules to be adopted by the Department of Legal Affairs ("DLA").[4] The bill presently does not contain any provisions that would ensure that these other persons are truly authorized by consumers to submit Floridians' requests. The lack of detail on verifying authorized parties to submit requests could lead to other persons or entities submitting bulk opt out choices on behalf of Florida consumers without any proof that they were actually authorized to submit such requests. Such a result could significantly cripple a small business's ability to operate and grow its business. Floridians should be required to exercise opt out requests themselves to help

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[2] California Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act Regulations* at 11 (August 2019), located at https://www.tellusventure.com/downloads/privacy/calif_doj_regulatory_impact_assessment_ccpa_14aug2019.pdf.
[3] *Id*.
[4] HB 969 at Section 2, § 9(c).

ensure that their true choices are honored, and they are not subject to fraudulent opt out requests submitted by intermediary companies without their permission.

Keeping opt-out requests within the consumer's purview would help to make them aware of the consequences of their opt out decisions. HB 969 as currently written could also enable intermediaries to tamper with consumer choices by setting default opt-out preferences for Floridians without fully explaining the results of those opt-out choices to them. To protect Floridians and to ensure their choices are honored, HB 969 should empower consumers to control and exercise their right to opt out.

III. HB 969's Data Retention Schedule Restrictions Are Overly Burdensome and Unnecessary

HB 969 would place strict data retention rules on businesses, prohibiting them from using or retaining personal information upon the earliest completion of any of the following criteria: "satisfaction of the initial purpose for collecting or obtaining such information," the duration of a contract, or 1 year after the last consumer interaction with the business.[5] This requirement is not present in any other state privacy law and would needlessly hinder businesses' ability to provide useful services to consumers.

It would also hinder businesses' ability to market to past consumers who have used their services. This impact could particularly affect small businesses and start-ups in Florida who may benefit from reaching out to consumers who have used their products in the past to market to them. Companies retain data in the regular course of business for multiple legitimate purposes, such as fraud prevention and back-up storage. In particular, back-ups are an indispensable part of continuity of operations plans, as they allow for data protection and recovery in the event of cybersecurity incidents, natural disasters, or other unanticipated events. Requiring businesses to refrain from using or retaining personal information at an arbitrary time, with only limited exceptions for "biometric information used for ticketing purposes," does not take into account the specific needs of businesses or benefits that accrue to consumers by businesses' maintenance of such information. This provision of the bill is shortsighted, overly burdensome, and unnecessary. We respectfully request that this requirement be removed from HB 969.

IV. HB 969 Should Not Include a Private Right of Action

HB 969 would provide a private right of action to consumers in the event of unauthorized access and exfiltration, theft, or disclosure of *any* personal information as a result of a business's violation of the duty to maintain reasonable security practices.[6] Though the bill proposes two definitions of the term "personal information"—one to update the state breach notification law in Section 1 and another to apply to the privacy-related provisions of the bill in Section 2—HB 969 does not clarify to which definition of "personal information" the private right of action would apply.[7] As a result, although HB 969's private right of action appears to be worded similarly to the limited private right of action in the CCPA, the effect of HB 969's private right of action could extend much more broadly than California's.

[5] *Id*. at Section 2, § 2(f).
[6] *Id*. at Section 2, § 12.
[7] *Compare id.* at Section 1, § 1(g) *with* Section 2, § (1)(m),

We strongly believe that the responsibility for enforcing violations of privacy laws should be vested in the state alone, and HB 969 should not contain any avenue for individuals to bring private lawsuits for violations. We therefore ask the Subcommittee to remove the private right of action provision from the bill and vest enforcement responsibility in the DLA alone. Alternatively, the Subcommittee should amend the bill to clarify that the private right of action applies to the definition of "personal information" in Section 1 of the bill rather than Section 2, and insert a 30-day period allowing for businesses to cure such alleged violations before being subject to a private action. This amendment would appear to be in line with legislators' intent, as the preamble of the bill suggests the private right of action should apply to a more limited subset of personal information.[8]

A. The Proposed Legislation is Ambiguous. The private right of action contained in the CCPA is structured so it does *not* apply to all personal information. That law limits its private right of action to certain data breaches involving a *limited subset* of "personal information" that if misappropriated could lead to identity theft. [9] However, as currently written under HB 969, exposure of *any* data element considered to be "personal information" under the bill's expansive definition of the term could be viewed as grounds for a private right of action, even data elements that pose virtually no risk of identity theft. HB 969's private right of action is therefore overly broad and misaligned with other state privacy laws.

In general, incorporating a private right of action in HB 969 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood Florida'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.

B. A Private Cause of Action Does Not Benefit Consumers. Additionally, including a private right of action in HB 969 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. The threat of an expensive lawsuit may force smaller companies to agree to settle claims against them even if they are convinced they are without merit.

Beyond the staggering cost to Florida 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

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[8] *See* HB 969 Preamble, which states that the bill would "provid[e] a private right of action for consumers whose nonencrypted and nonredacted personal information or e-mail addresses are subject to unauthorized access…."

[9] *See* Cal. Civ. Code 1798.150(a)(1) ("Any consumer whose nonencrypted and nonredacted personal information, **as defined in subparagraph (A) of paragraph (1) of subdivision (d) of Section 1798.81.5**, is subject to an unauthorized access and exfiltration, theft, or disclosure… may institute a civil action….") (emphasis added).

legislators to remove the private right of action from HB 969, or, at a minimum, make clear that it applies to the definition of "personal information" set forth in Section 1 of the bill rather than Section 2 as well as provide a 30-day cure period for private actions. Enforcement responsibility for privacy-related legal violations should be with the state DLA alone. This approach 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.

V. The Data-Driven and Ad-Supported Online Ecosystem Benefits Floridians and Fuels Economic Growth

Throughout the past three decades, the U.S. economy has been fueled by the free flow of data through the Internet. Floridians, like all consumers across the country, have benefitted greatly from this Internet ecosystem. 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 Floridians expect and rely on, including video, news, music, and more. Data-driven advertising allows Floridians to access these resources at little or no cost to them, and it has created an environment where small publishers and start-up companies in the state and elsewhere can enter the marketplace to compete against the Internet's largest players.

Transfers of data over the Internet enable modern digital advertising, which subsidizes and supports the broader economy and helps to expose Floridians to products, services, and offerings they want to receive. Digital advertising enables online publishers to offer content, news, services and more to Floridians 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.[10] 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.[11] HB 969, if enacted, would disrupt this crucially important ad-subsidized Internet model, which consumers have expressed that they value and would not want to see replaced.

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.[12] 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.[13]

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[10] 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.

[11] *Id*.

[12] 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.

[13] *Id*.

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 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.[14] 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.

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We and our members support protecting consumer privacy. We believe HB 969 would impose new and particularly onerous requirements on entities doing business in the state, and would unnecessarily impede Florida residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider the bill and instead convert it to a study so Floridians can benefit from the legislature's careful consideration of approaches to data regulation that benefit consumers and businesses alike.

Thank you in advance for consideration of this letter.

Sincerely,

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[14] 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.