

AMENDMENTS TO FLORIDA SB 1734

Suggested amendments to Florida SB 1734 are set forth below.

I. VEST ENFORCEMENT OF SB 1734 IN THE DEPARTMENT OF LEGAL AFFAIRS ALONE

A private right of action 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 approach that does 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.

- Proposed Amendment: Strike Section 7, Section 501.177 in its entirety and insert the underlined text in its place:

Section 7, Section 501.177 Enforcement

- (a) The Department of Legal Affairs shall have exclusive authority to enforce the provisions of this section.
- (b) Prior to initiating any action under this section, the Department of Legal Affairs shall provide a business, service provider, or other person or entity 30 days’ written notice identifying the specific provisions of this section the Department of Legal Affairs alleges have been or are being violated. If within the 30-day period, the business, service provider, or other person or entity cures the noticed violation and provides the Department of Legal Affairs an express written statement that the alleged violations have been cured and that no further violations shall occur, no action shall be initiated against the business, service provider, or other person or entity.
- (c) If a business, service provider, or other person or entity continues to violate this section following the cure period in subsection (b) or breaches an express written statement provided to the Department of Legal Affairs under that subsection, the Department of Legal Affairs may initiate an action against such business, service provider, or other person or entity and may seek an injunction to restrain any violations of this section and civil penalties of not more than \$2,500 for each unintentional violation or \$7,500 for each intentional violation under this section.

(d) Nothing in this section shall be construed as providing the basis for, or be subject to, a private right of action for violations of this section or under any other laws.

II. PROTECT PSEUDONYMIZED INFORMATION UNDER CERTAIN CONSUMER RIGHTS

Pseudonymized data protects an individual's privacy because it does not include data that specifically identifies individuals as a name, email address, or postal address would. Pseudonymized data, by definition, is not linked to such identifying information. If pseudonymous data is covered, in order to provide access, correction, or deletion rights, Floridian businesses may feel compelled to specifically identify individuals, instead of maintaining data in pseudonymized form, which would undermine the privacy protective nature of pseudonymized data. By focusing consumer rights on controlling the use of such data instead, the Florida law would better foster privacy protections for consumers.

- Proposed Amendment: Insert the following text as the last subsection in Section 5, Section 501.175:

(7) The rights afforded to consumers in this subsections (1), (4), (6) and (8) of this section do not apply to pseudonymized information in cases where a business is able to demonstrate any information necessary to identify the consumer is kept separately and is subject to effective technical and organizational controls that prevent the controller from accessing such information. "Pseudonymous information" means personal information that cannot be attributed to a specific natural person without the use of additional information, provided that such additional information is kept separately and is subject to appropriate technical and organizational measures to ensure that the personal information is not attributed to an identified or identifiable natural person.

III. CLARIFY ESSENTIAL AD OPERATIONS ARE NOT SUBJECT TO AN OPT-OUT REQUESTS

SB 1734 would provide a Florida resident with the right to opt out of sales of personal information and the processing of personal information for targeted advertising. 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 definition of "targeted advertising" makes clear that certain advertising operations that are critical for the functionality of the Internet may persist. The proposed amendment below ensures those advertising operations are not covered by the definition of "sale."

- Proposed Amendment: Amend the definition of "sale" or "sell" in subsection (22) of Section 3, 501.174, by inserting the following text in a new subsection (22)(b)3.:

3. Collecting, using, maintaining, or transferring personal information as reasonably necessary to engage in delivery of an advertisement, counting and limiting the number of advertising impressions, and validating and verifying positioning and quality of ad impressions.

IV. AMEND THE TIMELINE FOR RESPONDING TO OPT-OUT REQUESTS

A two-day timing requirement for facilitating opt out requests would be the most aggressive and onerous timeframe adopted under any state privacy law. This requirement would not provide businesses with enough time to update suppression files and systems to ensure personal information associated with the consumer is not passed on to third parties. Many businesses need to communicate opt out requests to various internal systems within the enterprise before they are able to fully effectuate an opt out request, which takes time and resources. The proposed amendment would provide necessary clarity to covered entities.

- Proposed Amendment: Amend subsection (5)(c) of Section 5, Section 501.175, per the following underlined text:

(5)(c) For consumers who exercise their right to opt out of the sale of their personal information, refrain from selling personal information the business collected about the consumer as soon as reasonably possible but no longer than ~~2 business days~~ 15 days after receiving the request to opt out.

V. Keeping Consumer Rights Within Their Control

The Florida law should protect consumer rights to ensure their rights are exercised only with their authorization. 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 authorized to submit such requests. Such a result could significantly cripple a small business's ability to operate and grow its business.

- Proposed Amendment: Strike subsection (10) and subsection (13) of Section 5, Section 501.175 in their entirety.

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