



April 20, 2021

The Honorable Governor Ron DeSantis
State of Florida
The Capitol
400 South Monroe Street
Tallahassee, FL 32399

The Honorable Senator Wilton Simpson
Florida Senate President
409 The Capitol
404 South Monroe Street
Tallahassee, FL 39399

The Honorable Representative Chris Sprowls
Florida Speaker of the House
420 The Capitol
402 South Monroe Street
Tallahassee, FL 32399

RE: Letter in Opposition to Florida SB 1734 and HB 969

Dear Governor DeSantis, House Speaker Sprowls, and Senate President Simpson:

On behalf of the advertising industry, we oppose Florida SB 1734 and HB 969 (the “Bills”).¹ We offer the following comments summarizing our concerns with the proposed legislation and ask the legislature not to move forward with the Bills. As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country ranging from small businesses to household brands, advertising agencies, and technology providers that do business in Florida. We appreciate your willingness to consider the following points.

We believe consumer privacy is an important value, and Floridians deserve meaningful privacy protections. We commend the efforts of Senator Jennifer Bradley and Representative Fiona McFarland to introduce and develop privacy legislation. While certain amendments to the Bills have been considered and adopted this session, we still have significant concerns with the proposed legislation. In particular, material differences still exist between SB 1734 and HB 969. Both bills would fall short of establishing effective or practical privacy standards for Florida consumers while creating substantial compliance costs and straining precious resources for Florida businesses at a time when they are still coming back from disruptions caused by the COVID-19 pandemic.

To illustrate this point, the most recently amended version of HB 969 still contains a private right of action. Including a private right of action in the Bills would cripple small businesses, deter companies from doing business in Florida, and serve as a windfall for the plaintiff’s bar, without providing commensurate benefits for consumers. If included in the legislation, it would be by far the

¹ SB 1734 (Fla. 2021) (hereinafter “SB 1734”), located [here](#); HB 969 (Fla. 2021) (hereinafter “HB 969”), located [here](#).

broadest private right of action in regard to privacy in the United States. In addition, HB 969 also still includes an onerous data retention restriction that would impede Florida businesses such as hotels, cruise lines, restaurants, theme parks, and others from reconnecting with customers more than two years after they last interacted with them. It would especially affect businesses in the tourism and hospitality industries that have not had significant interactions with consumers over the past two years, largely due to the COVID-19 pandemic.

At the same time, the Bills also fall short of the key goal to establish effective or practical privacy standards. For instance, HB 969 includes new, onerous requirements for third-party businesses to provide certain notices to consumers without clarifying how these companies could provide such notice, since third parties by definition do not have direct relationships with consumers. In particular, the proposed legislation envisions requiring third parties to provide notice to consumers “at or before the point of [personal information] collection,” which is impossible for third-party companies who often do not have direct contact with consumers. However, because the requirement applies broadly to “a business that collects personal information,” third parties would be required to do so. Without a technical fix to this provision, third parties may be prevented from collecting data altogether. This outcome could impact the economy, business competition, and sales of data that have no privacy implications. It could also impede critical uses of data that are necessary to deliver products and services that consumers value and expect, and it could result in blocking “sales”—*i.e.*, transfers— of data that help protect consumers against fraud.

In addition to these key issues, as described in more detail in **Exhibit 1**, a letter our organizations filed with the Senate Committee on Commerce and Tourism on March 22, 2021, we raise the following issues that have not been addressed by amendments to the Bills.

- **The Bills Should Not Include a Private Right of Action.** Including a private right of action in the Bills would stifle innovation in Florida, create significant costs for small and mid-sized businesses, destroy companies, and cost Florida consumers jobs.² In addition, a private right of action would substantially hinder small Florida businesses’ ability stay afloat during one of the most challenging economic periods in recent history, while simultaneously delivering a competitive advantage to larger companies that have the funds and resources to contend with new privacy compliance obligations.³
- **The Bills’ Definitions of “Sell” Are Unclear.** SB 1734 provides consumers the right to opt out of business sales of personal information as well as targeted advertising, but exemptions to the definition of targeted advertising are not carried through to the definition of sell. The Bills do not clarify how the definitions of “targeted advertising” and “sell” work together and could therefore hinder important transfers of data that power the functionality of the modern Internet.
- **The Bills Should Not Permit Others to Exercise Floridians’ Privacy Rights.** The Bills’ terms allowing another person to opt out of the sale or sharing of personal information for a consumer could lead to fraudulent requests as well as thwart true consumer preferences. The Bills have not developed safeguards against this type of anticompetitive or fraudulent activity.

² See Dan Jaffe, *Rush to pass ‘big tech’ privacy bills will harm Florida’s small businesses*, TALLAHASSEE DEMOCRAT (Apr. 4, 2021), located [here](#).

³ See David LeDuc, *GOP swing at ‘Big Tech’ could hit small businesses instead*, FLORIDA POLITICS (Apr. 8, 2021), located [here](#).

- **Florida Should Provide Sufficient Time for Businesses to Act on Opt-Out Requests.** If enacted, SB 1734’s two-day compliance requirement for opt-out requests would be by far the most aggressive timeline adopted under any state privacy law. A two-day requirement would not provide businesses with enough time to communicate opt-out requests to various internal systems within the enterprise or enable them to update suppression files to ensure personal information associated with a consumer is not passed on to third parties. The bill should allow businesses at least fifteen days to comply with opt-out requests.
- **The Deletion Right Should Be Harmonized with Other State Laws.** The Bills’ deletion right is written so broadly that it could extend to *any* information about a consumer. This formulation of the right to delete could extend beyond information that is solely associated with the one consumer making a deletion request, thereby impacting the rights of others. The legislature should align the Bills’ right to delete with other state privacy laws so it applies only to information a business has collected “from” a consumer.

More time is needed to refine the Bills so they can create practical privacy standards for Florida consumers, without unnecessarily threatening critical Florida industries. **The legislature should not pass SB 1734 or HB 969 in the closing days of this legislative session.** We stand ready to work with you to achieve privacy reform that works for all Floridians in 2022.

Thank you in advance for consideration of this letter.

Sincerely,

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American Advertising Federation – Orlando
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EXHIBIT 1



March 22, 2021

The Honorable Senator Ed Hooper
Chair of the Senate Committee on
Commerce and Tourism
302 Senate Building
404 South Monroe Street
Tallahassee, FL 32399-1100

The Honorable Senator Tom A. Wright
Vice Chair of the Senate Committee on
Commerce and Tourism
320 Senate Building
404 South Monroe Street
Tallahassee, FL 32399-1100

The Honorable Senator Jennifer Bradley
324 Senate Building
404 South Monroe Street
Tallahassee, FL 32399-1100

RE: Letter in Opposition to Florida SB 1734

Dear Senator Bradley, Chair Hooper, and Vice Chair Wright:

On behalf of the advertising industry, we oppose Florida SB 1734 in its current form,¹ and we offer these comments summarizing our concerns and recommending key amendments to 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, SB 1734 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.

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 make certain amendments to SB 1734, as detailed further below, and undertake a study of available approaches to regulate data privacy before moving forward with enacting the onerous, and in some cases outdated, provisions set forth in SB 1734. As presently written, SB 1734 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 spend, and drives more than 80 percent of our nation's digital advertising expenditures. We look forward to continuing to engage with the Senate Committee on Commerce and Tourism ("Committee") as it considers SB 1734.

¹ SB 1734, Committee Amendment D 482404 (Fla. 2021) (hereinafter "SB 1734"), located [here](#).

I. SB 1734 Should Not Include a Private Right of Action

As presently drafted, SB 1734 includes a broad private right of action for any violation of the bill.² We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the Florida Attorney General (“AG”), as elaborated on further below, because such an enforcement structure would lead to strong outcomes for Floridians while better enabling businesses to allocate funds to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements. AG enforcement, instead of a private right of action, is in the best interests of consumers and businesses alike.

A private right of action in SB 1734 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.

Additionally, including a private right of action in SB 1734 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 would not effectively address consumer privacy concerns or deter undesired business conduct. A private right of action would expose businesses 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 businesses’ attempts to innovate by threatening companies 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 legislators to remove the private right of action from the bill and replace it with a framework that makes enforcement responsibility the purview of the AG alone. An AG enforcement framework would lead to strong outcomes for consumers while better enabling businesses to allocate funds to facilitating compliance with new data privacy requirements under SB 1734.

II. Minor Clarifications to the Bill’s Sale Definition Will Better Serve Consumers and Provide Needed Clarity for Businesses

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.³ However, the bill

² *Id.* at Section 7, § 501.177(1).

³ *Id.* at Section 5, § 501.175(1).

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 an advertisement to a consumer where the advertisement is selected based on personal data obtained from a consumer’s activities over time and across businesses, websites, and online applications other than the business, website, or online application with which the consumer is intentionally interacting, to predict such consumer’s preferences or interests.”⁴ The definition of targeted advertising *excludes* “nonpersonalized advertising” and essential ad operations that are imperative for the Internet to work, because such ad operations are not used to “predict [a] consumer’s preference or interests.”⁵ These operations include ad delivery, reporting, and ad fraud prevention.

The bill’s definition of sale, however, does not include a similar delineation that provides cover for essential ad operations, and consequently, enables the continued functionality of the Internet.⁶ Sale is defined broadly as “the... transferring... of a consumer’s personal information by a business to a third party for monetary or other tangible or intangible consideration for any commercial purpose.”⁷ It is unclear from this definition whether a consumer opt out from sale 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. Our suggested updates to SB 1734’s definition of sale are set forth in **Exhibit A**. We ask you to add an exception to the definition of the term “sale” pursuant to our suggested language so it makes clear that an opt out from sale would not apply to activities that are carved out from the definition of targeted advertising as essential ad operations.

III. SB 1734 Should Not Permit Others to Exercise Floridians’ Privacy Rights

SB 1734 would permit a consumer to “authorize another person to opt-out of the sale or sharing of the consumer’s personal information” and require a business to comply with an opt-out request received by such a person, including through a “user-enabled global privacy control, such as a browser plug-in or privacy setting, device setting, or other mechanism...”⁸ To protect consumers’ choices and help ensure that their true privacy preferences are honored, we strongly believe businesses should only be required comply with opt-out requests expressed through global privacy controls when protections and measures exist to ensure those choices are authentic, user-enabled expressions of user choices, rather than default technology settings.

SB 1734 presently lacks a specific requirement to ensure that other persons are actually authorized by consumers to submit Floridians’ requests, or any rules governing how to determine if a global privacy control is truly “user-enabled.” The lack of detail provided in the bill for verifying authorized parties to submit requests could lead to other persons, entities, or intermediaries submitting bulk opt-out requests through global privacy controls 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 or mid-size business’s ability to operate and grow its business in the

⁴ *Id.* at Section 3, § 501.174(25).

⁵ *See id.*

⁶ *Id.* at Section 3, § 501.174(22).

⁷ *Id.*

⁸ *Id.* at Section 5, § 501.175(10).

state of Florida. Floridians should be required to exercise opt-out requests themselves to help 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. The bill 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, SB 1734 should empower consumers to control and exercise their right to opt out by removing the requirement to honor global privacy controls set through a browser plug-in, device setting, or other mechanism.

IV. The Bill Should Allow Businesses at Least Fifteen Days to Comply with Opt-Out Requests

As presently written, the bill would require a business to comply with a consumer's request to opt out of personal information sales no longer than two business days after receiving the request to opt out.⁹ If enacted, this timing requirement for facilitating opt out requests would be the most aggressive and onerous timeframe adopted under any state privacy law. Such an extraordinarily condensed two-day timeframe for compliance with opt out requests would also make Florida's law more operationally burdensome for businesses than other state privacy laws like the California Consumer Privacy Act of 2018 ("CCPA"), which allows fifteen days for a business to comply with opt out requests after receiving them. A two-day 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. We therefore respectfully ask you to change the two-day timing requirement for compliance with opt out requests to at least a fifteen-day requirement.

V. The Bill's Deletion Right Should Be Harmonized with the Same Right in Other State Laws

SB 1734 gives a consumer the right to "submit a verified request for the deletion of their personal information that the business has collected."¹⁰ This formulation of the right to delete is overly broad and is not aligned with other laws that provide similar rights to individuals in other states. Our associations strongly believe that the United States should adopt federal legislation that would set forth a single national standard to clearly define prohibited data practices that make personal data vulnerable to breach or misuse, while preserving the benefits that come from the responsible use of data.¹¹ To date, Congress has not enacted such a national data privacy standard. In the absence of comprehensive federal consumer data privacy and security legislation, states should work to harmonize their approaches to such laws to foster uniformity in rights and rules for consumers and businesses alike. We therefore ask the Committee to recast the right to delete in SB 1734 as a consumer's right to request deletion of personal information that the business has collected "from" them.

⁹*Id.* at § 501.175(5)(c).

¹⁰ *Id.* at § 501.175(6).

¹¹ See PRIVACY FOR AMERICA, located at <https://www.privacyforamerica.com/>

Permitting a consumer to delete *any* personal information relating to them could extend beyond information that is solely associated with the one consumer making the deletion request, thereby impacting the rights of others. In addition, other state privacy laws, such as the CCPA, use different wording to describe the right to delete. The CCPA gives consumers the right to delete personal information “about the consumer which the business has collected **from** the consumer.”¹² Aligning the right to delete with the same right in other states that have enacted omnibus privacy legislation would help to minimize consumer confusion about the scope of their privacy rights and what it means to effectuate them. Additionally, ensuring the language used to describe the deletion right matches with the CCPA will help to simplify businesses’ compliance responsibilities so they do not have to adopt differing approaches to deletion for individuals living in different states. We ask the Committee to slightly amend SB 1734 to give Floridians the right to request deletion of personal information about them that the business has collected “from” them.

VI. 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.¹³ 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 2016.¹⁴ SB 1734, 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-

¹² Cal. Civ. Code § 1798.105 (emphasis added).

¹³ 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.

¹⁴ *Id.*

supported Internet created 10.4 million jobs.¹⁵ 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.¹⁶

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.¹⁷ 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.

* * *

¹⁵ 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>.

¹⁶ *Id.*

¹⁷ 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.

We and our members support protecting consumer privacy. We believe SB 1734 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 accept the changes we have proposed and reconsider the bill by converting 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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Exhibit A

Suggested Language for the Second Substitute of Senate Bill 1734

Our suggested edits to the WPA's current definition of "sale" are indicated in red below:

(22)(a) "Sale" or "sell" means the sale, rental, release, disclosure, dissemination, making available, loaning, sharing, transferring, or other communication, orally, in writing, or by electronic or other means, of a consumer's personal information by a business to a third party for monetary or other tangible or intangible consideration or for any commercial purpose.

(b) The term does not include any of the following:

1. The disclosure, for a business purpose, of personal information by a business to a service provider who processes the personal information on behalf of the business.

2. The disclosure, for the purposes of providing a product or service requested by the consumer, of personal information by a business to another business resulting from the consumer's intentional interaction.

3. The collection, use, maintenance, or transfer of 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, so long as such personal data is not used for targeted advertising.