January 19, 2022

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The Honorable Senator Joe Nguyen
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The Honorable Senator John Lovic
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The Honorable Senator Jamie Pedersen
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RE: Ad Trade Letter in Opposition to Washington SB 5813

Dear Senators Carlyle, Nguyen, Liias, Lovic, and Pedersen:

On behalf of the nation's leading advertising and marketing trade associations, we share your interest in protecting the privacy of Washington residents. SB 5813, however, differs substantially from existing privacy laws in other states, and sets forth requirements that would limit consumers' access to vital information and content online and harm competition. Therefore, we oppose SB 5813 and ask you to decline to move forward with the bill as currently drafted.[1] We provide comment on Washington SB 5813 below.

We and our members believe that data privacy is an exceedingly important value that should be the subject of preemptive federal legislation, as state efforts to pass privacy laws only add to the increasingly complex privacy landscape for both consumers and businesses across the country. As currently written, SB 5813 resembles no other state privacy law that has been enacted to date. In the absence of a comprehensive preemptive federal privacy law, harmonization across state privacy laws is crucial to ensure consumers have equal protections and to facilitate businesses' ability to comply with complex privacy requirements. If the legislature nonetheless decides to continue its effort to pass a privacy law in Washington, we encourage it to consider an approach to privacy that

[1] SB 5813 (Wash. 2022), located here (hereinafter, "SB 5813").

aligns with recently enacted legislation in other states, such as the Virginia Consumer Data Protection Act ("VCDPA").[2]

With respect to SB 5813, we are concerned with the broad and overly restrictive opt-in consent requirements for "data brokers" and data concerning adolescents. The breadth of these requirements is present in no other existing state privacy law. In addition, the bill's "do not track" provisions are unclear and unnecessary. Finally, we believe enforcement of any privacy law should be vested exclusively in the Washington Attorney General ("AG"). For the foregoing reasons, as explained in more detail below, we ask the Washington legislature to decline to advance SB 5813 through the legislative process.

Our organizations collectively represent thousands of companies, from small businesses to household brands, advertising agencies, and technology providers, including a significant number of Washington businesses. Our combined membership includes more than 2,500 companies and is responsible for more than 85 percent of U.S. advertising spend. Through robust self-regulatory bodies and strong industry-imposed standards, our members engage in responsible data collection and use that benefits consumers and the economy, and we believe consumers deserve consistent and enforceable privacy protections in the marketplace. Thank you for the opportunity to provide the following comments on SB 5813.

I. The Legislature Should Align Its Privacy Legislation Approach with Existing State Privacy Laws

In the absence of a preemptive federal data privacy law, it is critical for legislators to seriously consider the costs to both consumers and businesses that will accrue from a patchwork of differing privacy standards across the states. If the Washington legislature decides to continue consideration of SB 5813, we ask you to alter the bill so it better aligns with recently enacted privacy legislation in other states, such as the VCDPA.[3] Harmonization with existing privacy laws is essential for minimizing costs of compliance and fostering similar consumer privacy rights. Moreover, compliance costs associated with divergent privacy laws are significant. To make the point: a regulatory impact assessment of the California Consumer Privacy Act of 2018 concluded that the initial compliance costs to California firms would be $55 billion.[4] Another recent study found that a consumer data privacy proposal in a different state considering privacy legislation would have generated a direct initial compliance cost of $6.2 billion to $21 billion and an ongoing annual compliance costs of $4.6 billion to $12.7 billion for the state.[5] Washington should not add to this compliance bill for businesses, and should instead opt for an approach to data privacy that is in harmony with already existing state privacy laws.

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[2] *See* Virginia Consumer Data Protection Act, §§ Va. Code Ann. 59.1-571 et seq., located here.
[3] *Id.*
[4] *See* State of California Department of Justice Office of the Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations*, 11 (Aug. 2019), located at https://www.dof.ca.gov/Forecasting/Economics/Major_Regulations/Major_Regulations_Table/documents/CCPA_Regulations-SRIA-DOF.pdf.
[5] *See* Florida Tax Watch, *Who Knows What? An Independent Analysis of the Potential Effects of Consumer Data Privacy Legislation in Florida*, 2 (Oct. 2021), located at https://floridataxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986.

II. SB 5813's Opt-In Consent Requirement for Data Brokers Is an Unreasonable Restriction on Legitimate Business Practices and Would Cause Consumer Harm

SB 5813 would broadly define the term "data brokers," capturing tens of thousands of businesses within its scope and subjecting their operations to opt-in consent.[6] These requirements, if enacted, would constitute the most onerous approach to legitimate data processing in any state. Instead of adopting broad and unreasonable requirements for data processing, SB 5813 should be refined to provide consumers with protections that will allow them to continue to enjoy access to a broad range of legitimate data-supported services and offerings as well as engage in routine and essential day-to-day activities online without interruption.

If the broad opt-in consent requirement contained in SB 5813 were enacted, it would unfairly restrain these legitimate businesses and reduce access to the data they provide to small businesses, nonprofits, campaigns, emerging new businesses, as well as entrepreneurs of all sizes in every sector of the economy. By virtue of their business model, it would be practically impossible to acquire permissions from consumers at scale by legitimate businesses who provide backend data to power the nation's consumer-facing businesses' growth and ambitions. SB 5813's approach could eliminate vital data sources necessary for the most basic and valued business operations, including fraud protection and marketing, and would reduce competition by raising barriers to market entry.

Specifically, the broad opt-in consent requirements in SB 5813 would limit Washingtonians' access to online services and vital information, as described in more detail in **Appendix A**. Data sourced from "data brokers" helps new businesses enter and compete in the market by enabling them to access audiences for their products and services. Such data also helps more mature businesses enhance their understanding of existing customers. "Data brokers" help fuel advertising, which supports the vast and varied free and low-cost news, content, online products and services, and other information individuals are able to readily access through the Internet. As a result, the legislature would reduce the availability of an important revenue stream option for many companies, and Washingtonians would enjoy less access to free online content, as subscription-based services and resources will likely dominate their online experiences.

For these reasons, the Washington legislature should remove the opt-in consent provisions from SB 5813 and replace them with opt out provisions that are consistent with approaches taken in every other state that has passed comprehensive data privacy legislation.

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III. SB 5813's Provisions Related to Adolescents Are Ambiguous, Operationally Infeasible, and Would Lead to Less Online Resources for Teens

Our organizations support heightened protections for uses of data associated with adolescents; however, the broad opt-in consent requirements in SB 5813 and the bill's related terms regarding requirements for adolescent data processing are unclear. These provisions should be removed from the bill. SB 5813 includes unclear provisions that set forth requirements for

[6] SB 5813 at Sec. 203.

businesses' processing of personal data about adolescents.[7] For example, the bill would prohibit a business from "unreasonably tak[ing] advantage of or unreasonably fail[ing] to account for or remedy: (i) [a] lack of understanding by an adolescent… of the material risks, costs, or conditions of a product or service involving the processing of personal data."[8] The bill provides no information regarding how a business must "account for or remedy" an adolescent's lack of understanding the way a given product or service processes personal data. The provisions surrounding adolescents in the bill, including its broad opt-in consent requirement for data processing, are consequently difficult if not impossible for businesses to operationally effectuate. If enacted, the bill's onerous and confusing terms related to adolescents would likely lead to a chilling effect on teens' ability to access resources at a time in their lives when they should enjoy wide access to the Internet to inform their education and development (everything from summer camp brochures to future school choices and myriad other opportunities which are part of American life).

IV. The Bill's Exemption From the Definition of "Data Broker" for Providing Publicly Available Information Related to a Consumer's Business or Profession is Too Narrow

SB 5813 provides a broad definition of "data broker," stating it includes "a business, or unit or units of a business, separately or together, that knowingly collects and sells or licenses to third parties the brokered personal data of a consumer with whom the business does not have a direct relationship."[9] The bill excludes from the definition activities involving a data broker's provision of "publicly available information related to a consumer's business or profession."[10] This exemption is too narrow, as it does not similarly exempt other information in the public domain that is not related to a consumer's business or profession. Access to public record data is a key element of American democracy. Public record data provides individuals with the ability to access transparent information maintained by government agencies, such as census records and real property transactions. Information in the public sphere should remain available for public use without exceptions. SB 5813's exemptions for publicly available information should mirror similar exemptions in other state privacy laws and should not be unreasonably limited to certain subsets of public information.

V. The Bill's "Do Not Track" Provisions are Unnecessary and Unclear

SB 5813 dedicates an entire section to requiring businesses to honor "user-selected do not track" mechanisms to facilitate requests to opt out of targeted advertising and sales of personal data.[11] This section is unnecessary, as consumers already have the ability to opt out of targeted advertising through industry tools that have existed for more than a decade.[12] Additionally, the language SB 5813 uses to describe such "user-selected do not track" mechanisms is confusing, as it conflates an old notion of do-not-track technologies with legal requirements to respond to consumer requests to opt out of certain uses of data and data transfers. "Do not track" is an antiquated term with specific connotations that do not align with the present consumer online experience, as the

[7] *Id*. at Sec. 102(2), (3).
[8] *Id*. at Sec. 107(9).
[9] *Id*. at Sec. 201(8).
[10] *Id*.
[11] *Id*. at Sec. 303.
[12] DAA, *YourAdChoices,* located here.

major operating systems and browsers have removed "tracking" controls from their systems. Attempting to revive the outdated concept of do-not-track technologies by shoehorning it into a state privacy bill will only add significant confusion to an already complex consumer privacy landscape.

VI. SB 5813 Should Vest Enforcement Exclusively in the Washington Attorney General

As presently drafted, SB 5813 allows for private litigants to bring lawsuits to seek injunctive relief and recover attorneys' fees and costs directly incurred in pursuit of claims under the bill to any prevailing plaintiff.[13] We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the AG, because such an enforcement structure would lead to strong outcomes for Washingtonians 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 5813 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood Washington'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. 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.

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[13] SB 5813 at Sec. 110, Sec. 210, Sec. 305.

Thank you for your consideration of these comments. We look forward to continuing to work with the legislature as it considers SB 5813 and, with more than a decade of hand-on experience in this complex area, make ourselves available to be a source of information as the legislature weighs privacy.

Sincerely,

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APPENDIX A

Data-Driven Advertising Provides Significant Benefits to Washington Residents, to the Economy, and to All Consumers

Over the past several decades, data-driven advertising has created a platform for innovation and tremendous growth opportunities. A new study found that the Internet economy's contribution to the United States' gross domestic product ("GDP") grew 22 percent per year since 2016, in a national economy that grows between two to three percent per year.[14] In 2020 alone, it contributed $2.45 trillion to the U.S.'s $21.18 trillion GDP, which marks an eightfold growth from the Internet's contribution to GDP in 2008 of $300 billion.[15] Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet, 7 million more than four years ago.[16] More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.[17] The same study found that the ad-supported Internet supported 222,243 full-time jobs across Washington, more than double the growth in Internet-driven employment in the state from 2016.[18]

A. Advertising Fuels Economic Growth

Data-driven advertising supports a competitive online marketplace and contributes to tremendous economic growth. Overly restrictive legislation that significantly hinders certain advertising practices, such as third-party tracking, could yield tens of billions of dollars in losses for the U.S. economy.[19] One recent study found that "[t]he U.S. open web's independent publishers and companies reliant on open web tech would lose between $32 and $39 billion in annual revenue by 2025" if third-party tracking were to end "without mitigation."[20] That same study found that the lost revenue would become absorbed by "walled gardens," or entrenched market players, thereby consolidating power and revenue in a small group of powerful entities.[21] Smaller news and information publishers, multi-genre content publishers, and specialized research and user-generated content would lose more than an estimated $15.5 billion in revenue.[22] Data-driven advertising has thus helped to stratify economic market power, ensuring that smaller online publishers can remain competitive with large global technology companies.

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[14] *See* John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 5 (Oct. 18, 2021), located https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf.
[15] *Id*.
[16] *Id*.
[17] *Id*. at 6.
[18] *Compare id.* at 135-36 (Oct. 18, 2021), located here *with* John Deighton, Leora Kornfeld, and Marlon Gerra, *Economic Value of the Advertising-Supported Internet Ecosystem,* INTERACTIVE ADVERTISING BUREAU, 106 (2017), located here (finding that Internet employment contributed 108,079 full-time jobs to the Washington workforce in 2016 and 222,243 jobs in 2020).
[19] *See* John Deighton, *The Socioeconomic Impact of Internet Tracking* 4 (Feb. 2020), located at https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf.
[20] *Id*. at 34.
[21] *Id*. at 15-16.
[22] *Id*. at 28.

B. Advertising Supports Washingtonians' Access to Online Services and Content

In addition to providing economic benefits, data-driven advertising subsidizes the vast and varied free and low-cost content publishers offer consumers through the Internet, including public health announcements, news, and cutting-edge information about COVID-19. Advertising revenue is an important source of funds for digital publishers,[23] and decreased advertising spends directly translate into lost profits for those outlets. Since the coronavirus pandemic began, 62 percent of advertising sellers have seen advertising rates decline.[24] Publishers have been impacted 14 percent more by such reductions than others in the industry.[25] Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.[26] Legislative models that inhibit or restrict digital advertising can cripple news sites, blogs, online encyclopedias, and other vital information repositories, thereby compounding the detrimental impacts to the economy presented by COVID-19. The effects of such legislative models ultimately harm consumers by reducing the availability of free or low-cost educational content that is available online.

C. Consumers Prefer Personalized Ads & Ad-Supported Digital Content and Media

Consumers, across income levels and geography, embrace the ad-supported Internet and use it to create value in all areas of life. Importantly, research demonstrates that consumers are generally not reluctant to participate online due to data-driven advertising and marketing practices. One study found more than half of consumers (53 percent) desire relevant ads, and a significant majority (86 percent) desire tailored discounts for online products and services.[27] Additionally, in a recent Zogby survey conducted by the Digital Advertising Alliance, 90 percent of consumers stated that free content was important to the overall value of the Internet and 85 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.[28] 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

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[23] *See* Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

[24] IAB, *Covid's Impact on Ad Pricing* (May 28, 2020), located at https://www.iab.com/wp-content/uploads/2020/05/IAB_Sell-Side_Ad_Revenue_2_CPMs_5.28.2020.pdf

[25] *Id*.

[26] *See* John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located at https://www.ipc.be/~/media/documents/public/markets/the-value-of-data-consequences-for-insight-innovation-and-efficiency-in-the-us-economy.pdf.

[27] Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), located at https://www.thompsoncoburn.com/docs/default-source/Blog-documents/consumer-attitudes-toward-relevant-online-behavioral-advertising-crucial-evidence-in-the-data-privacy-debates.pdf?sfvrsn=86d44cea_0.

[28] Digital Advertising Alliance, *Zogby Analytics Public Opinion Survey on Value of the Ad-Supported Internet Summary Report* (May 2016), located at https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/ZogbyAnalyticsConsumerValueStudy2016.pdf.

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.[29]

During challenging societal and economic times such as those we are currently experiencing, laws that restrict access to information and economic growth can have lasting and damaging effects. The ability of consumers to provide, and companies to responsibly collect and use, consumer data has been an integral part of the dissemination of information and the fabric of our economy for decades. The collection and use of data are vital to our daily lives, as much of the content we consume over the Internet is powered by open flows of information that are supported by advertising. We therefore respectfully ask you to carefully consider any future legislation's potential impact on advertising, the consumers who reap the benefits of such advertising, and the overall economy before advancing it through the legislative process.

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[29] 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.