



February 22, 2022

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

The Honorable Rep. Erin Grall
Chair of the House Judiciary Committee
417 House Office Building
402 South Monroe Street
Tallahassee, FL 32399

The Honorable Rep. Cord Byrd
Vice Chair of the House Judiciary Committee
400 House Office Building
402 South Monroe Street
Tallahassee, FL 32399

RE: Letter in Opposition to Florida HB 9

Dear Rep. McFarland, Rep. Grall, and Rep. Byrd:

On behalf of the advertising industry, we oppose Florida HB 9.¹ We offer the following comments summarizing our primary, but non-exhaustive, list of concerns with the legislation as currently drafted, and we provide suggested amendments to the bill. We appreciate your willingness to consider these points so close to the hearing on HB 9.

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 and responsible industry policies. However, state efforts to pass privacy laws only add to the increasingly complex privacy landscape for both consumers and businesses throughout the country. We and our members therefore support a national standard for data privacy at the federal level. If the Florida legislature nonetheless decides to continue its effort to pass a privacy law in Florida, we encourage it to consider an approach to privacy that aligns with recently enacted legislation in other states, such as the Virginia Consumer Data Protection Act (“VCDPA”). As described in more detail in **Appendix A**, HB 9 should be amended in line with the following suggestions:

- **Florida Should Take Steps to Harmonize Its Approach to Privacy with Other State Laws**
- **HB 9 Should Include Safeguards to Prevent Intermediaries from Setting “Global Privacy Controls” on Behalf of Consumers and Should Not Allow Others to Exercise Floridians’ Privacy Rights**
- **HB 9’s Data Retention Schedule Restrictions Are Overly Burdensome and Unnecessary and Should Be Removed from the Bill**
- **HB 9 Should Not Include a Private Right of Action**

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 HB 9, as detailed in Appendix A. As currently drafted, HB 9 falls short of creating a regulatory system that will work well for Florida consumers or businesses.

¹ HB 9 (Fla. 2022) (hereinafter “HB 9”), located [here](#).

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 House Judiciary Committee ("Committee") as it considers HB 9.

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We and our members support protecting consumer privacy. We believe HB 9 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 to amend the legislation.

Thank you in advance for consideration of this letter.

Sincerely,

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APPENDIX A: AD TRADE COALITION COMMENTS IN OPPOSITION TO FLORIDA HB 9

I. Florida Should Take Steps to Harmonize Its Approach to Privacy with Other State Laws

Harmonization in state privacy law standards is in the interests of consumers and businesses alike, including those of Floridians. Uniformity helps to ensure consumers are subject to similar privacy protections no matter where they live and businesses can take a more holistic approach to privacy law compliance. HB 9 differs starkly from existing privacy laws, which would cause significant confusion for businesses and consumers alike. Florida should not adopt a law that differs from and competes with existing laws when alternative approaches exist that protect consumers while offering consistency across states. We encourage the legislature to examine already-enacted consumer protection standards that are available for regulating data privacy, including the VCDPA, before moving forward with HB 9.

In the absence of a national standard for data privacy at the federal level, it is critical for legislators seriously to consider the costs to both consumers and businesses that will accrue from a patchwork of differing privacy standards across the states. Harmonization with existing privacy laws is essential for minimizing costs of compliance and fostering similar consumer privacy rights. Compliance costs associated with divergent privacy laws are significant. To make the point: a recent study found that a 2021 consumer data privacy proposal in Florida 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.² In California, 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.³ Other studies confirm the staggering costs associated with varying state privacy standards. One report found that state privacy laws could impose out-of-state costs of between \$98 billion and \$112 billion annually, with costs exceeding \$1 trillion dollars over a 10-year period and small businesses shouldering a significant portion of the compliance cost burden.⁴ Florida should not add to this compliance burden to businesses.

II. HB 9 Should Include Safeguards to Prevent Intermediaries from Setting “Global Privacy Controls” on Behalf of Consumers and Should Not Allow Others to Exercise Floridians’ Privacy Rights

HB 9 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”).⁵ Additionally, the bill would give businesses the option of accepting a request to opt out received through a “user-enabled global privacy control, such as a browser plug-in or privacy setting, device setting, or other mechanisms, which communicates or signals the consumer’s choice to opt out.”⁶ These provisions are not accompanied

² 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://floridatxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986>.

³ 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.

⁴ Daniel Castro, Luke Dascoli, and Gillian Diebold, *The Looming Cost of a Patchwork of State Privacy Laws* (Jan. 24, 2022), located at <https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws> (finding that small businesses would bear approximately \$20-23 billion of the out-of-state cost burden associated with state privacy law compliance annually).

⁵ HB 9 at Section 7(b).

⁶ *Id.* at Section 7(a)(1).

by sufficient safeguards to ensure a preference indicated by another person or a global privacy control setting is a true expression of a consumer's choice.

The lack of detail on verifying authorized persons to submit requests on behalf of consumers could lead to other persons or entities submitting bulk opt out choices for Floridians without any proof that they were actually authorized to submit such requests. This result could significantly cripple a small business's ability to operate and grow its business in the state. 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.

Similarly, "global privacy controls" should be designed and implemented in a manner that ensures a preference expressed through the setting is enabled by a consumer, and does not unfairly disadvantage or advantage one business or model over another.⁷ Otherwise, these settings run the risk of intermediary interference, as the companies that stand between businesses and consumers, such as browsers and others, can set such controls by default without requiring an affirmative consumer action to initiate the control. Unconfigurable, global opt out setting mechanisms have already been introduced in the market, making decisions for consumers by default without requiring them to affirmatively turn on the mechanisms.⁸ These tools are not user-enabled, as they do not provide any assurance that consumers themselves are the ones making privacy choices. Consumers should be assured the ability to take an action to enable these settings, and such settings should be subject to specific parameters that ensure they do not unfairly advantage certain businesses at the expense of others.

HB 9's terms that allow others to submit privacy requests on behalf of consumers and its provisions related to global privacy controls could enable intermediaries to tamper with consumer choices by setting default opt-out preferences for Floridians without such preferences being enabled by the consumer. To protect Floridians and to ensure their choices are honored, HB 9 should empower consumers alone to control and exercise their right to opt out.

III. HB 9's Data Retention Schedule Restrictions Are Overly Burdensome and Unnecessary and Should Be Removed from the Bill

HB 9 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 which such information was collected or obtained," the duration of a contract, or 3 years after the last consumer interaction with the business.⁹ 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 customers 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

⁷ See, CPRA, § 1798.185(a)(19)(A); Colorado Privacy Act, § 6-1-1313(2).

⁸ See Brave, *Global Privacy Control, a new Privacy Standard Proposal, now Available in Brave's Desktop and Android Testing Versions*, located [here](#) ("Importantly, Brave does not require users to change anything to start using the GPC to assert your privacy rights. For versions of Brave that have GPC implemented, the feature is on by default and unconfigurable.")

⁹ HB 9 at Section 3(e).

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 9.

IV. HB 9 Should Not Include a Private Right of Action

HB 9 would allow for private litigants to bring lawsuits for certain violations of the bill.¹⁰ We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the DLA, 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. DLA enforcement, instead of a private right of action, is in the best interests of consumers and businesses alike.

A private right of action in HB 9 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 HB 9 would have a chilling effect on Florida'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 DLA alone.

V. Data-Driven Advertising Provides Significant Benefits to Florida 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.¹¹ 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.¹² Additionally, more than 17 million jobs in the U.S. were generated by the

¹⁰ *Id.* at Section 10(a).

¹¹ 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.

¹² *Id.*

commercial Internet, 7 million more than four years ago.¹³ More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.¹⁴ The same study found that the ad-supported Internet supported 370,122 full-time jobs across Florida, more than double the number of Internet-driven jobs in the state from 2016.¹⁵

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.¹⁶ 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.”¹⁷ 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.¹⁸ 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 revenue¹⁹. Data-driven advertising has thus helped to stratify economic market power, ensuring that smaller online publishers can remain competitive with large global technology companies.

B. Advertising Supports Floridians’ 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. Advertising revenue is an important source of funds for digital publishers,²⁰ and decreased advertising spends directly translate into lost profits for those outlets. Since the pandemic began, 62 percent of advertising sellers have seen advertising rates decline.²¹ Publishers have been impacted 14 percent more by such reductions than others in the industry.²² Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²³ Legislative models that inhibit or restrict digital advertising can cripple news sites, blogs, online encyclopedias, and other vital information repositories. The effects of such legislative models ultimately harm consumers by reducing the availability of free or low-cost educational content that is available online.

¹³ *Id.*

¹⁴ *Id.* at 6.

¹⁵ Compare *id.* at 130-31 (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 181,349 full-time jobs to the Florida workforce in 2016 and 370,122 jobs in 2020).

¹⁶ 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>.

¹⁷ *Id.* at 34.

¹⁸ *Id.* at 15-16.

¹⁹ *Id.* at 28.

²⁰ See Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

²¹ 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

²² *Id.*

²³ 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>.

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.²⁴ 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.²⁵ 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 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.²⁶

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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²⁴ 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.

²⁵ 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.

²⁶ 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.