June 2, 2022

Kate Denison
Deputy Legislative Director
Attorney General's Office
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301

RE: Suggested Amendments to Oregon Comprehensive Privacy Law Draft

Dear Ms. Denison:

On behalf of the advertising industry, we provide feedback on the Oregon Comprehensive Privacy Law Draft ("Draft") as it currently stands. We and the companies we represent, many of whom do substantial business in Oregon, strongly believe consumers deserve meaningful privacy protections supported by reasonable laws and responsible industry policies. However, we are concerned that state efforts to pass privacy laws will 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 Oregon Consumer Privacy Task Force ("Task Force") continues its effort to draft a privacy law in conjunction with the Oregon Attorney General's Office, we encourage you to consider an approach to privacy that aligns with recently enacted legislation in the majority of other states. Below we identify areas where harmonizing the Draft with other existing state privacy laws would benefit consumers and businesses. Specifically, we encourage you harmonize this draft to:

- Recognize the privacy benefits of pseudonymous data.
- Avoid prescribing onerous disclosure and consent requirements.
- Vest enforcement responsibility in the Attorney General alone.

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, long-standing and emerging publishers, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product ("GDP") in 2020.[1] Our group has more than a decade's worth of hands-on experience it can bring to bear on matters related to consumer privacy and controls. We note that one of our coalition partners – the Association of National Advertisers – has been participating in your Task Force meetings. We would welcome the opportunity to engage with you further on our suggested amendments to the Draft outlined here.

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

In the absence of a national standard for data privacy at the federal level, it is critical for legislators to seriously consider the costs to both consumers and businesses that will accrue from a

[1] John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located at https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf (hereinafter, "Deighton & Kornfeld 2021").

patchwork of differing privacy standards across the states. Harmonization with existing privacy laws is essential for creating an environment where consumers in Oregon and other states have a consistent set of expectations, while minimizing compliance costs for businesses. 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 ("CCPA") concluded that the initial compliance costs to California firms for the CCPA *alone* would be $55 billion.[2] Additionally, a recent study on a proposed privacy bill in a different state found that the proposal would have generated a direct initial compliance cost of $6.2 billion to $21 billion, and an ongoing annual compliance cost of $4.6 billion to $12.7 billion for the state.[3] Other studies confirm the staggering costs associated with different 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] Oregon should not add to this compliance burden for businesses and should instead opt for an approach to data privacy that is in harmony with already existing state privacy laws.

II. The Draft Is Inconsistent With Existing Privacy Laws Because It Fails to Address the Concept of Pseudonymous Data

One way the Draft diverges from existing state privacy laws is that it fails to address the concept of pseudonymous data. The vast majority of state privacy laws recognize the privacy benefits of "pseudonymous data," which is typically defined to include personal data that cannot be attributed to a specific natural person without the use of additional information. These other laws exempt this data from consumer rights to access, delete, correct, and port personal data, provided that this data is kept separately from information necessary to identify a consumer and is subject to effective technical and organizational controls to prevent the controller from accessing such information. Without an explicit exemption for pseudonymous data from consumer rights, controllers could be forced to reidentify data or to maintain it in identifiable form in order to ensure they can, for example, return such information to a consumer in response to an access request. Requiring companies to link pseudonymous data with identifiable information is less privacy protective for consumers than permitting and encouraging companies to keep such data sets separate. We ask you and the Task Force to amend the Draft and harmonize it with other privacy laws to exempt pseudonymous data from consumer rights of access, correction, deletion, and portability.

III. The Draft Diverges From Existing Privacy Laws Because It Requires Controllers to Disclose the Names of Specific Third Party Partners

Another way the Draft diverges from existing state privacy laws is that it would require controllers to disclose "the specific third parties to whom… personal data was disclosed" upon a consumer's request. The other states that recently enacted privacy laws did not include this impractical requirement. Instead, the other state laws require companies to disclose the *categories* of third parties to whom they transfer personal information rather than the specific names of such third parties themselves. Mandating that companies disclose the names of their third-party partners could obligate

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[2] *See* State of California Department of Justice Office of the Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations* at 11 (Aug. 2019), located at https://www.dof.ca.gov/Forecasting/Economics/Major_Regulations/Major_Regulations_Table/documents/CCPA_Regulations-SRIA-DOF.pdf.

[3] *See* Florida Tax Watch, *Who Knows What? An Independent Analysis of the Potential Effects of Consumer Data Privacy Legislation in Florida* at 2 (Oct. 2021), located at https://floridataxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986.

[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).

companies to abridge confidentiality clauses they maintain in their contracts with partners. Additionally, from an operational standpoint, constantly updating a list of all third-party partners a controller works with would take significant resources and time away from companies' efforts to comply with other new privacy directives in the Draft. Finally, the consumer benefit that would accrue from their receipt of a list of third party partners to whom a business discloses data would be minimal at best. For these reasons, we encourage you and the Task Force to reconsider this onerous requirement, which severely diverges from the approach to required disclosures taken in existing state privacy laws.

IV. Broad Opt-in Consent Requirements Impede Consumers from Receiving Critical, Relevant Information and Messages

As discussed in more detail in Section VI below, the data-driven and ad-supported online ecosystem benefits consumers and fuels economic growth and competition. Companies, nonprofits, and government agencies alike use data to send varying groups of individuals specific, relevant messages. Tailored messaging provides immense public benefit by reaching individual consumers with information that is relevant to them in the right time and place. Legal requirements that limit entities' ability to use demographic data responsibly to reach consumers with important and pertinent messaging, such as those set forth in the Draft's sensitive data opt in consent requirements, can have unintended consequences and, ultimately, serve as a detriment to consumers' health and welfare.

Ad-technology systems and processes enable everything from public health messaging to retailer messaging. They allow timely wildfire warnings to reach local communities and facilitate the dissemination of missing children alerts, among myriad other beneficial uses with the very same technology and techniques used for tailored advertising.[5] In accordance with responsible data use, uses of data for tailored advertising should be subject to notice requirements and effective user controls. Legal requirements should focus on prohibiting discriminatory uses of such data and other uses that could endanger the health or welfare of consumers instead of placing blanket opt-in consent requirements on uses of data.

One-size-fits-all opt-in requirements for data uses run the risk of regulating out of existence beneficial uses of information that help consumers, businesses, and non-profits by making messaging and information more relevant to individuals. Opt-in consent requirements also tend to work to the advantage of large, entrenched market players at the expense of smaller businesses and start-up companies. To ensure uses of demographic data to benefit Oregon residents can persist, and to help maintain a competitive business marketplace, we encourage you and the Task Force to remove the broad opt in consent requirement for "sensitive data" processing. We suggest that you replace it with a requirement for opt in consent only when such data will be used in furtherance of decisions that produce legal or similarly significant effects concerning a consumer. Such an approach would not only help to maintain competitive balance, but also reduce the risk of notice fatigue which some other laws have created as an unintended consequence.[6]

V. The Draft Should Vest Enforcement Exclusively in the Oregon Attorney General

The Draft presently states that a private right of action is up "for discussion." We strongly believe a private right of action is not an effective enforcement mechanism for privacy legislation.

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[5] *See* Digital Advertising Alliance, *Summit Snapshot: Data 4 Good – The Ad Council, Federation for Internet Alerts Deploy Data for Vital Public Safety Initiatives* (Sept. 1, 2021), located at https://digitaladvertisingalliance.org/blog/summit-snapshot-data-4-good-%E2%80%93-ad-council-federation-internet-alerts-deploy-data-vital-public.

[6] Kate Fazzini, *Europe's sweeping privacy rule was supposed to change the internet, but so far it's mostly created frustration for users, companies, and regulators*, CNBC (May 5, 2019), located at https://www.cnbc.com/2019/05/04/gdpr-has-frustrated-users-and-regulators.html.

Instead, enforcement should be vested with the Oregon Attorney General ("AG"). This enforcement structure would lead to effective compliance by businesses and strong outcomes for state residents, while better enabling businesses to allocate funds to develop processes and procedures 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 the Draft would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood Oregon'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 the Draft 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 Oregon 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 Draft and replace it with a framework that makes enforcement responsibility the purview of the AG alone.

VI. The Data-Driven and Ad-Supported Online Ecosystem Benefits Oregon Residents and Fuels Economic Growth

Over the past several decades, data-driven advertising has created a platform for innovation and tremendous growth opportunities. A recent study found that the Internet economy's contribution to the United States' GDP grew 22 percent per year since 2016, in a national economy that grows between two to three percent per year.[7] 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.[8] Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet in 2020, 7 million more than four years prior.[9] More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.[10] The same study found that the ad-supported Internet supported 82,491 full-time jobs across Oregon, more than double the number of Internet-driven jobs from 2016.[11]

[7] Deighton & Kornfeld 2021 at 5.
[8] *Id*.
[9] *Id*.
[10] *Id*. at 6.
[11] *Compare id.* at 132 (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 36,339 full-time jobs to the Oregon workforce in 2016 and 82,491 jobs in 2020).

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.[12] 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."[13] 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.[14] 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.[15] 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 Oregon Residents' 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. Advertising revenue is an important source of funds for digital publishers,[16] and decreased advertising spends directly translate into lost profits for those outlets. Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.[17] 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.

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.[18] 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

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[12] *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.
[13] *Id.* at 34.
[14] *Id.* at 15-16.
[15] *Id.* at 28.
[16] *See* Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.
[17] *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.
[18] 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.

must pay for most content.[19] 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.[20]

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 and the Task Force 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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We and our members support protecting consumer privacy. We believe the Draft would impose particularly onerous requirements on entities doing business in the state and would unnecessarily impede Oregon residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you and the Task Force to reconsider the Draft legislation or amend it to reflect the recommendations set forth in this letter. Again, we would welcome the opportunity to discuss these comments with you in greater detail.

Thank you in advance for consideration of this letter.

Sincerely,

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[19] 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.
[20] 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.