



February 4, 2022

The Honorable Rep. Timm Ormsby
Chair of the Washington House
Appropriations Committee
315 John L. O'Brien Building
PO Box 40600
Olympia, WA 98504

The Honorable Rep. Steve Bergquist
Vice Chair of the Washington House
Appropriations Committee
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The Honorable Rep. Mia Gregerson
Vice Chair of the Washington House
Appropriations Committee
328 John L. O'Brien Building
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The Honorable Rep. Nicole Macri
Vice Chair of the Washington House
Appropriations Committee
311 John L. O'Brien Building
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RE: Ad Trade Letter in Opposition to Washington HB 1850

Dear Representatives Ormsby, Bergquist, Gregerson, and Macri:

On behalf of the nation's leading advertising and marketing trade associations, we share your interest in protecting the privacy of Washington residents. Washington HB 1850, however, differs 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 HB 1850 and ask you to decline to move forward with the bill as currently drafted.¹ We provide comment on a non-exhaustive list of concerning provisions in Washington HB 1850 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 throughout the country. 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 aligns with recently enacted legislation in other states, such as the Virginia Consumer Data Protection Act ("VCDPA").² Additionally, HB 1850 does not provide adequate safeguards for consumer choice and imposes limitations on key uses of demographic data that would ultimately harm consumers. Furthermore, enforcement of HB 1850 should be vested in the Washington Attorney General to provide consistent outcomes for consumers, and the bill should not permit a private right of action. For the foregoing reasons, as

¹ HB 1850 (Wash. 2022), located [here](#) (hereinafter, "HB 1850").

² See Virginia Consumer Data Protection Act, §§ Va. Code Ann. 59.1-571 et seq., located [here](#).

explained in more detail below, we ask the Washington legislature to decline to advance HB 1850 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 HB 1850.

I. Washington 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. 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 1850 differs from existing privacy laws, which would cause significant confusion for businesses and consumers alike. For example, HB 1850's registration requirement for processors and controllers is not present in any state privacy law.³ The breadth of the registration requirement would obligate all controllers and processors to submit information to the newly established Washington State Consumer Data Privacy Commission, thereby rendering the requirement ineffective as virtually any and all businesses operating in Washington would be compelled to register. Washington should not adopt a privacy legal regime that differs from and competes with existing laws when alternative approaches exist that protect consumers while offering consistency across states. We encourage the General Assembly to examine already-enacted consumer protection standards that are available for regulating data privacy, including the VCDPA, before moving forward with HB 1850.

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. 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 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 Other studies confirm the staggering costs associated with

³ HB 1850, Sec. 13.

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

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.⁶ 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.

II. HB 1850’s Proposed Global Opt Out Provisions Lack Reasonable Safeguards to Protect Consumer Choice

HB 1850 would require businesses to allow consumers to exercise the right to opt out of targeted advertising and the sharing of personal information “[v]ia user-enabled global privacy controls, such as a browser plug-in or privacy setting, device setting, or other mechanism that communicates or signals the consumer’s choice to opt out.”⁷ Unfortunately, HB 1850’s current provisions surrounding such controls are not accompanied by sufficient safeguards to ensure a preference indicated by a setting is a true expression of a consumer’s choice. We urge you to either amend this provision or remove it from the bill for further consideration.

Choice settings must 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.⁸ 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. HB 1850 would accelerate the unintended consequence of creating a new class of gatekeepers, which would undercut competition in the market. 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.⁹ 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. For these reasons, the global privacy control provisions should be amended or removed from HB 1850.

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

As discussed in more detail in Section V 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. Targeted 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

⁶ 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).

⁷ HB 1850, Sec. 6(1)(b).

⁸ See, California Privacy Rights Act of 2020, Cal. Civ. Code § 1798.185(a)(19)(A); Colorado Privacy Act, Colo. Rev. Stat § 6-1-1313(2).

⁹ 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.”)

pertinent messaging, such as those set forth in HB 1850,¹⁰ can have unintended consequences and, ultimately, serve as a detriment to consumers' health and welfare.¹¹

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.¹² In accordance with responsible data use, uses of data for targeted 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 Washington residents can persist, and to help maintain a competitive business marketplace, we suggest that the Committee considers limiting any opt-in requirement to apply to demographic data only in cases where processing results in decisions that produce legal effects concerning a consumer.

IV. HB 1850 Should Vest Enforcement Exclusively in the Washington Attorney General

As presently drafted, HB 1850 allows for private litigants to bring lawsuits to seek injunctive relief and recover actual damages.¹³ We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the Washington Attorney General ("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 HB 1850 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

¹⁰ HB 1850, Sec. 9(8)(a).

¹¹ For example, broad opt-in requirements for demographic data could undermine public health efforts to ensure information about the pandemic and vaccines are accessible to all Washington residents. Businesses' ability to process key demographic data enables them to identify at-risk groups and reach out to these communities with crucial information about the coronavirus as well as information regarding who can receive vaccines at particular locations and particular times. Targeted messaging sent to various communities based on demographic characteristics have worked to encourage members of hard to reach communities to receive COVID-19 vaccinations. See Jeremy B. Merrill and Drew Harwell, *Telling conservatives it's a shot to 'restore our freedoms': How online ads are promoting coronavirus vaccination*, WASHINGTON POST (Aug. 24, 2021), located [here](#).

¹² See, e.g., 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 [here](#); Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at \$1,400/Year; Annual Value Jumps More Than \$200 Since 2016* (Sept. 28, 2020), located [here](#); Digital Advertising Alliance, *Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth \$1200/Year, 85 Percent Prefer Ad-Supported Internet to Paid* (May 11, 2016), located [here](#); Digital Advertising Alliance, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), located [here](#).

¹³ HB 1850, Sec. 20.

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.

V. 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.

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 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

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.

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.

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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Thank you for your consideration of these comments. We look forward to continuing to work with the legislature as it considers HB 1850 and, with more than a decade of hands-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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