



April 9, 2019

Texas House of Representatives
Committee on Business and Industry
P.O. Box 2910
Austin, Texas 78768-2910

Re: HB 4390

Dear Chairman Martinez Fischer and Members of the Committee:

The undersigned trade associations, whose members support more than 1.5 million jobs in Texas and account for more than \$500 billion of economic output or sales, respectfully oppose TX HB 4390 as currently drafted.¹ Our members engage in responsible data collection and use that benefits consumers and the economy, and we believe privacy deserves tough meaningful protection in the marketplace. We are concerned that HB 4390 will erode privacy protections for consumers, reduce online content and services that Texans enjoy, and have a crippling impact on the state's economy.

This letter follows up on our April 2, 2019 correspondence that outlined our members' commitment to data privacy as well as our concerns regarding the bill's treatment of pseudonymized data, among other matters. We write today to provide additional details on the unintended consequences of HB 4390, as drafted. Prior to moving this bill forward, we ask that the state study the potential impacts of the proposal on consumers, the economy, and jobs and make recommendations on how to avoid any negative effects.

In particular, we request further study and deliberation on the following provisions in the bill, which have analogues in the California Consumer Privacy Act and the European Union General Data Protection Regulation, but go significantly beyond such laws and will create confusing and potentially conflicting requirements that will make compliance nearly impossible in some cases.

1. Overarching Opt-In Consent Requirements Will Frustrate the Online Experience and Hurt Consumers and Businesses

No other privacy legislation being seriously considered in the rest of the country has as broad an opt-in consent requirement as HB 4390. There are multitude reasons why opt-in consent for data processing has never been broadly adopted in the United States and should not

¹ IHS Economics and Country Risk, *The Economic Impact of Advertising in the United States* (Mar. 2015); see also IAB, *The Economic Impact of Texas's Advertising-Supported Internet Ecosystem* (Mar. 2017). Our associations represent thousands of companies, from small businesses, to household brands, across every segment of the advertising industry, including a significant number of Texas businesses.



be mandated under Texas law. First, opt-in consent fails consumers, forcing them to read thousands of pages of terms and conditions and endlessly click “I Accept.” The constant appearances of consent boxes annoy online users and frustrate the consumer experience. Consumers also become desensitized to the constant requests, diminishing their sense of control over their privacy.

Additionally, opt-in consent will remove significant amounts of innocuous data that is used to serve the targeted advertisements that fuel free and low cost products and services. Without the ability to effectively advertise online due to opt-in consent barriers, revenues will be impacted and companies that rely on such revenue may no longer be able to support free and low cost content and services that Texans desire, such as online newspapers, social networking sites, mobile applications, email, and phone services. As a result, companies will be forced to charge consumers higher prices or create pay-walls that will disproportionately impact less affluent Texans.

2. One-Size-Fits-All Privacy Regulation Fails to Account for Consumer Expectations and Could Lead to Increased Data Collection

The bill’s provisions cover nearly all personal data types, regardless of the context in which the data was collected, consumer expectations, or potential for harm. In contrast, U.S. privacy law has historically recognized that context matters when regulating privacy since certain data types and activities create more risk than others (e.g., bank account information vs. a person’s shoe size.) However, the bill rejects this concept and instead creates an extremely broad definition of covered “personal identifying information,” including any category of information relating to an identified or identifiable individual. The result is a law that restricts the sharing of non-identifying innocuous data even when such data could be shared to improve products and services, prevent fraud, or provide other consumer benefits.

The bill’s broad provisions also could have the unintended effect of reducing consumer privacy. By treating innocuous, pseudonymized marketing data in the same manner as data that could directly identify an individual, the bill would force businesses to collect more data about consumers so that they could actually identify the specific person that makes a request regarding data about them, such as an access or deletion request. Specially, in order to effectuate consumer requests, a business would be forced to associate non-identifiable device data with a specific person seeking to exercise their rights. This approach would remove existing data privacy protections enjoyed by Texas residents.

3. Certain of the Bill’s Provisions Unintentionally Increase the Risk of Consumer and Business Harm

As drafted, the access right creates security risks for consumers. This provision strongly incentivizes combining identifiable data in one place so that businesses can respond to these requests. The creation of data pools dramatically increase the risk of hackers attempting to acquire the data, which ordinarily is maintained separately as a security measure. These access



rights also significantly increase the risk of consumer fraud by permitting bad actors to correct or delete data to hide it from those they are trying to defraud.

Similarly, the deletion right creates security risks for businesses. This provision allows individuals and employees who are under investigation for fraud, embezzlement, or sexual harassment to require deletion of information their employer has on them. It also allows thieves who steal from retail stores to require the store to delete any of their information being used in internal investigations.

4. The Bill's Definition of "Privacy Risk" Creates an Impossible Compliance Standard

As drafted, the bill prohibits the use of data whenever the data is automatically processed (this could be any electronic data processing—such as counting the number of users who visit a particular online news article or click on a certain type of advertisement), unless there is an assessment of “privacy risk” and any risks are mitigated. There is no way a business can accurately assess the likelihood of a “privacy risk” when that risk includes such subjective factors as “fear” and “embarrassment” that change for each person. This is significant because, as drafted, the provision would have the effect of preventing nearly all automated processing of personal information, which is critical to detect security and fraud risks, analyze an individual’s preferences, and authenticate employees (who are covered under this legislation), among many other pro-consumer uses.

5. The Bill Fails to Provide Exceptions for Everyday Data Uses that Protect Consumers and Meet their Expectations

The bill’s opt-in consent provisions apply to all types of processing without the typical exceptions that are found in privacy laws. The Federal Trade Commission’s 2012 privacy report, for instance, explicitly provides for certain data processing without opt-in consent, stating, “companies do not need to provide choice before collecting and using consumers’ data for practices that are consistent with the context of the transaction, consistent with the company’s relationship with the consumer, or as required or specifically authorized by law,” and referenced product fulfillment, internal operations, fraud prevention, and first-party marketing, and other categories as generally meeting such a standard.² Such exceptions are not clearly accounted for by the bill in its current form.

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Now Is the Time To Study the Potential Effects of the Bill on Texans and Texas Businesses to Determine the Best Policy Prescriptions Going Forward

² FTC, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers (Mar. 2012), available at: <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.



Given the concerns highlighted above, which will create drastic changes to the digital economy, it is important to ensure that any changes to the state's information privacy laws are carefully crafted to avoid consumer harm. To that end, we believe it would be ill-advised to pass HB 4390 until there is time to mitigate any unintentional consequences of the bill and assess the impact of these untested new rules on consumers and businesses.

We ask that the legislature, before moving broad privacy legislation, direct the state to carry out a detailed review of the potential impacts of HB 4390 on consumers, the economy, and jobs and make recommendations on how to avoid any negative impacts. We anticipate that the results will show that HB 4390, as presently drafted, will limit competition, overburden consumers with opt-in notices, and make an efficient and effective digital economy harder to maintain. Such research will be critical to the formulation of well-informed policy decisions and enforcement priorities.

Without clarification and adjustments, the bill could result in reduced privacy for consumers, rather than expanding it, as the bill intends. We stand ready to work with you to find solutions to these and other issues as the bill is considered by the Texas legislature.

Sincerely,

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