



March 26, 2021

The Honorable Drew Hansen
Chair, Civil Rights and Judiciary Committee
Washington State House of Representatives
John L. O'Brien Building
P.O. Box 40600
Olympia, WA 98504-0600

Re: S. 5062, The Washington Privacy Act (House Committee Amendment)—SUPPORT

Dear Chair Hansen,

Consumer Reports¹ writes in support of the SB 5062 House Committee Amendment (“Washington Privacy Act” or “WPA”), which outlines a strong framework to protect consumer privacy. Though consumers in Europe and California enjoy baseline privacy protections, Washingtonians currently do not have similar basic privacy rights. The WPA would address this by extending to Washington consumers the right to access, delete, and correct, and stop the sale of their personal information.

These protections are long overdue: consumers are constantly tracked, and information about their online and offline activities are combined to provide detailed insights into a consumers’ most personal characteristics, including health conditions, political affiliations, and sexual preferences. This information is sold as a matter of course, is used to deliver targeted advertising, facilitates differential pricing, and enables opaque algorithmic scoring—all of which can lead to disparate outcomes along racial and ethnic lines.

We particularly appreciate that the bill takes steps to ensure that the opt out is workable for consumers. Measures largely based on an opt-out model, like WPA and the California Consumer Privacy Act (CCPA), could require consumers to contact hundreds, if not thousands, of different companies in order to fully protect their privacy. Making matters worse, Consumer Reports has

¹ Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For over 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers’ interests, including their interest in securing effective privacy protections.

documented that some CCPA opt-out processes are so onerous that they have the effect of preventing consumers from stopping the sale of their information.² We appreciate that this version of the WPA, consistent with California law, requires companies to honor browser privacy signals as a “Do Not Sell” signal. Privacy researchers, advocates, and publishers have already created a “Do Not Sell” specification, the Global Privacy Control (GPC),³ which could help make the opt-out model more workable for consumers.⁴

Ideally, consumers would be able to use an online service or app safely without having to take any action, such as opting in or opting out—by including a strong data minimization requirement that limits data collection and sharing to what is reasonably necessary to provide the service *requested by the consumer* (in contrast, the bill limits data processing to that which is necessary to carry out the purposes for which it was collected—which could incentivize companies to collect data for additional, unnecessary purposes). But in the absence of strong data minimization requirements, at the very least, consumers need tools to ensure that they can better exercise their opt-out rights, such as a global opt out, which is provided by the WPA.

The bill includes several other important provisions that we recommend maintaining:

- *Controls over targeted advertising.* We appreciate that this version of the WPA has a strong definition of targeted advertising and ensures that pseudonymous information is covered by the opt out—providing key consumer controls over ad tracking. In California, many companies have sought to avoid the CCPA’s opt-out by claiming that much online data sharing is not technically a “sale”⁵ (appropriately, Prop. 24 expands the scope of California’s opt-out to include all data sharing and clarifies that targeted ads are clearly covered by this opt out).⁶ This version of the WPA closes loopholes to better ensure that consumers have a choice over whether internet giants like Google, Facebook, and Amazon serve targeted ads based on their own vast data stores on other websites. We also appreciate that the definition of targeted advertising clearly covers retargeting (targeting ads based on a consumer’s interaction with another, single site).

² Maureen Mahoney, *California Consumer Privacy Act: Are Consumers’ Rights Protected*, CONSUMER REPORTS (Oct. 1, 2020), https://advocacy.consumerreports.org/wp-content/uploads/2020/09/CR_CCPA-Are-Consumers-Digital-Rights-Protected_092020_vf.pdf.

³ Global Privacy Control, <https://globalprivacycontrol.org>.

⁴ Press release, *Announcing Global Privacy Control: Making it Easy for Consumers to Exercise Their Privacy Rights*, Global Privacy Control (Oct. 7, 2020), <https://globalprivacycontrol.org/press-release/20201007.html>.

⁵ Maureen Mahoney, *Many Companies Are Not Taking the California Consumer Privacy Act Seriously—The Attorney General Needs To Act*, DIGITAL LAB AT CONSUMER REPORTS (Jan. 9, 2020), <https://medium.com/cr-digital-lab/companies-are-not-taking-the-california-consumer-privacy-act-seriously-dcb1d06128bb>; *The State of Authorized Agent Opt Outs*, *supra* note 7, at 16.

⁶ Maureen Mahoney, *Consumer Reports Urges Californians to Vote Yes on Proposition 24*, DIGITAL LAB AT CONSUMER REPORTS (Oct. 23, 2020), <https://medium.com/cr-digital-lab/consumer-reports-urges-californians-to-vote-yes-on-proposition-24-693c26c8b4bd>.

- *Strong enforcement:* We applaud you for including a private right of action. Given the AG’s limited resources, a private right of action is key to incentivizing companies to comply. Further, it’s appropriate that consumers are able to hold companies accountable in some way for violating their rights. We would prefer a private right that would also afford consumers monetary relief, but empowering consumers to obtain injunctive relief and costs is a significant step forward. We also appreciate that the “right to cure” provision in administrative enforcement sunsets in 2023: this “get-out-of-jail-free” card ties the AG’s hands and signals that a company won’t be punished for breaking the law.
- *Non-discrimination.* The WPA has strong non-discrimination language. Not only does the non-discrimination language in WPA clarify that consumers cannot be charged for exercising their rights under the law, but it makes it clear that legitimate loyalty programs, that reward consumers for repeated patronage, are supported by the law. We appreciate the work that has been done in the WPA to ensure that privacy protections aren’t just for those who can afford them.
- *Authorized agent opt outs.* We also appreciate that the WPA allows consumers to delegate to third parties the ability to submit opt-out requests on their behalf—allowing for a practical option for consumers to exercise their privacy rights in an opt-out framework. Consumer Reports has already begun to experiment with submitting opt-out requests on consumers’ behalf, with their permission, through the CCPA’s authorized agent provisions. We found that consumers are enthusiastic about this option.⁷ Authorized agent services can be an important supplement to platform-level global opt outs. However, we urge you to consider extending authorized agent provisions to access and deletion requests, as in California. For example, an authorized agent could also perform deletion requests on behalf of consumers, for which there is not an analogous tool similar to the GPC.
- *Prohibition on dark patterns.* We thank you for including a prohibition on dark patterns—deceptive user interfaces that can lead consumers to take actions they didn’t intend to, including to share more personal information. This bill provides important protections to ensure that opt-in consent is meaningful. Too often, companies often use

⁷ Ginny Fahs, *Putting the CCPA into Practice: Piloting a CR Authorized Agent*, DIGITAL LAB AT CONSUMER REPORTS (Oct. 19, 2020), <https://medium.com/cr-digital-lab/putting-the-ccpa-into-practice-piloting-a-cr-authorized-agent-7301a72ca9f8>; Maureen Mahoney et al., *The State of Authorized Agent Opt Outs Under the California Consumer Privacy Act*, CONSUMER REPORTS (Feb. 2021), https://advocacy.consumerreports.org/wp-content/uploads/2021/02/CR_AuthorizedAgentCCPA_022021_VF_.pdf.

dubious dark patterns to nudge users to click “OK,” providing the veneer, but not the reality of, knowing consent.⁸

- *Data security requirements.* This bill would create new categories of personal information, and the bill appropriately requires companies to use reasonable security protocols to safeguard the confidentiality and integrity of covered information.

Finally, we appreciate that new sections have been added to the WPA this year to ensure that data processed in order to help address the COVID-19 crisis has additional protections, and that the definitions and enforcement provisions have been further strengthened with respect to this data.

Thank you again for your consideration, and for your work on this legislation. We look forward to working with you to ensure that Washingtonians have the strongest possible privacy protections.

Sincerely,

Maureen Mahoney
Senior Policy Analyst

Justin Brookman
Director, Technology Policy

cc: Members, House Civil Rights and Judiciary Committee
The Honorable Laurie Jinkins
The Honorable Reuven Carlyle

⁸ *Most Cookie Banners are Annoying and Deceptive. This Is Not Consent*, PRIVACY INTERNATIONAL (last visited March 26, 2021), <https://privacyinternational.org/explainer/2975/most-cookie-banners-are-annoying-and-deceptive-not-consent>.