January 19, 2022

Sen. Clyde Perfect, Chairman
Commerce & Technology Committee
Indiana State Senate
200 West Washington Street
Indianapolis, IN 46204-2785

Re: SB 358, Personal information and social media policies

Dear Chair Perfect,

Consumer Reports[1] thanks you for your work to advance consumer privacy by considering SB 358. This bill would extend to Indiana consumers important rights: the right to know the information companies have collected about them, the right to delete that information, and the right to stop the disclosure of certain information to third parties, with additional rights for children and teens.

Protections for personal information 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.

Privacy laws should set strong limits on the data that companies can collect and share so that consumers can use online services or apps safely without having to take any action, such as opting in or opting out. We recommend including a strong data minimization requirement that limits data collection and sharing to what is reasonably necessary to provide the service

[1] Founded in 1936, Consumer Reports (CR) is an independent, nonprofit and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR advocates for laws and company practices that put consumers first. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today's consumers, and provides ad-free content and tools to 6 million members across the U.S.

requested by the consumer, as outlined in our model bill.[2] A strong default prohibition on data sharing is preferable to an opt-out based regime which relies on users to hunt down and navigate divergent opt-out processes for potentially thousands of different companies. Consumer Reports has documented that some California Consumer Privacy Act (CCPA) opt-out processes are so onerous that they have the effect of preventing consumers from stopping the sale of their information.[3]

However, within the parameters of an opt-out based bill, we make the following recommendations to improve the privacy provisions of SB 358:

- *Require companies to honor browser privacy signals as opt outs.* In the absence of strong data minimization requirements, at the very least, consumers need tools to ensure that they can better exercise their rights, such as a global opt out. CCPA regulations *require* companies to honor browser privacy signals as a "Do Not Sell" signal; Proposition 24 added the global opt-out requirement to the statute. The new Colorado law requires it as well.[4] Privacy researchers, advocates, and publishers have already created a "Do Not Sell" specification designed to work with the CCPA, the Global Privacy Control (GPC).[5] This could help make the opt-out model more workable for consumers,[6] but unless companies are required to comply, it is unlikely that consumers will benefit.

  We recommend using the following language:

  > Consumers may exercise their rights to opt out of the selling or sharing of their personal information via user-enabled global privacy controls, such as a browser plug-in or privacy setting, device setting, or other mechanism, that communicate or signal the consumer's choice to opt out, and a business shall comply with such an opt-out request in accordance with regulations adopted by the Attorney General.

- *Clarify definition of sharing or sale to ensure that targeted advertising is adequately covered.* SB 358's opt out should cover all data made available or transferred to a third

[2] *Model State Privacy Act*, CONSUMER REPORTS (Feb. 23, 2021), https://advocacy.consumerreports.org/research/consumer-reports-model-state-data-privacy-act/.
[3] *Consumer Reports Study Finds Significant Obstacles to Exercising California Privacy Right*s, CONSUMER REPORTS (Oct. 1, 2020), https://advocacy.consumerreports.org/press_release/consumer-reports-study-finds-significant-obstacles-to-exercising-california-privacy-rights/.
[4] Cal. Code Regs tit. 11 § 999.315(c); CPRA adds this existing regulatory requirement to the statute, going into effect on January 1, 2023, at Cal. Civ. Code § 1798.135(e) https://thecpra.org/#1798.135. For the Colorado law, see SB 21-190, 6-1-1306(1)(a)(IV)(B), https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_190_rer.pdf.
[5] Global Privacy Control, https://globalprivacycontrol.org.
[6] 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.

party for a commercial purpose (with narrowly tailored exceptions). 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"[7] (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). We recommend the following definition:

> "Share" or "sell" means renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to a third party for monetary or other valuable consideration, or otherwise for a commercial purpose.

- *Non-discrimination.* Consumers shouldn't be charged for exercising their privacy rights—otherwise, those rights are only extended to those who can afford to pay for them. Unfortunately, language in this bill could allow companies to charge consumers a different price if they opt out of the sale of their information. We urge you to adopt consensus language from the Washington Privacy Act that clarifies that consumers can't be charged declining to sell their information, and limits the disclosure of information to third parties pursuant to loyalty programs:

> A business may not discriminate against a consumer for exercising any of the rights contained in this [title], including denying goods or services to the consumer, charging different prices or rates for goods or services, and providing a different level of quality of goods and services to the consumer. This subsection does not prohibit a business from offering a different price, rate, level, quality, or selection of goods or services to a consumer, including offering goods or services for no fee, if the offering is in connection with a consumer's voluntary participation in a bona fide loyalty, rewards, premium features, discounts, or club card program. If a consumer exercises their rights pursuant to [opt-out section] of this [title], a controller may not sell personal information to a third-party business as part of such a program unless: (a) The sale is reasonably necessary to enable the third party to provide a benefit to which the consumer is entitled; (b) the sale of personal information to third parties is clearly disclosed in the terms of the program; and (c) the third party uses the personal information only for purposes of facilitating such a benefit to which the consumer is entitled and does not retain or otherwise use or disclose the personal information for any other purpose.

[7] 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.

While we offer these suggestions to improve the bill, we thank you for including key provisions in SB 358, which we urge you to keep.

- *"Authorized agent" rights:* We appreciate that this bill allows a consumer to designate a third party to perform 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 authorized agent provisions.[8] Authorized agent services will be an important supplement to platform-level global opt outs like Global Privacy Control (GPC). For example, an authorized agent could process offline opt-outs that are beyond the reach of a browser signal. An authorized agent could also perform access and deletion requests on behalf of consumers, for which there is not an analogous tool similar to the GPC.

- *Strong enforcement*: We commend you for not including a "right to cure" provision in administrative enforcement. Already, the AG has limited ability to enforce the law effectively against tech giants with billions of dollars a year in revenue. Forcing them to waste resources building cases that could go nowhere would further weaken their efficacy. In addition, we appreciate that the bill includes a private right of action—consumers should be able to hold companies accountable in some way for violating their rights.

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

Sincerely,

Maureen Mahoney
Senior Policy Analyst

cc: Members, Indiana Senate Committee on Commerce & Technology
The Honorable Liz Brown

[8] 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.