



January 19, 2022

The Honorable Reuven Carlyle  
Chair, Energy, Environment and Technology Committee  
Washington State Senate  
233 John A. Cherberg Building  
PO Box 40436  
Olympia, WA 98504

Re: SB 5813, Establishing data privacy protections to strengthen a consumer's ability to access, manage, and protect their personal data (2022)

Dear Senator Carlyle,

Consumer Reports<sup>1</sup> sincerely thanks you for your tireless work to advance consumer privacy in Washington State. SB 5318 would extend to Washington consumers important new rights, including new protections over the processing of children's data and the processing of personal information by data brokers, and by requiring businesses to honor browser privacy signals as an opt out of sale and targeted advertising.

Privacy 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.

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<sup>1</sup> 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.

We particularly appreciate that Part 3 of the bill takes steps to create a workable opt out for consumers. Measures largely based on an opt-out model, like 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 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.<sup>2</sup> This bill, consistent with California law, helps to address this problem by requiring 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),<sup>3</sup> which could help make the opt-out model more workable for consumers.<sup>4</sup>

Consumers should 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*. 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 this bill.

We also applaud you for including a private right of action in each part of the bill. 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.

However, we offer several suggestions to strengthen the bill, particularly the global opt out section, to provide the level of protections that Washingtonians deserve.

- *Expand the definition of sale.* The limited definition of sale, particularly in Part 3, could significantly limit the reach of the bill. In response to the California Consumer Privacy Act, many companies have claimed that they do not “sell” data to third parties to avoid complying with the opt out. The bill should instead clarify that all data disclosed or made available to a third party for a commercial purpose is in the scope of the bill’s protections.

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<sup>2</sup> 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](https://advocacy.consumerreports.org/wp-content/uploads/2020/09/CR_CCPA-Are-Consumers-Digital-Rights-Protected_092020_vf.pdf).

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

<sup>4</sup> 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>.

- *Add the non-discrimination language to Part 3.* We appreciate that strong non-discrimination language was included in Part 1 of the bill, but it should be added to the other sections as well. The non-discrimination language in Part 1 of the bill clarifies that consumers cannot be charged for exercising their rights under the law, and it makes it clear that legitimate loyalty programs, that reward consumers for repeated patronage, are supported by the law. By not including such language in the other sections of the bill, it could allow adults to be charged a different price in order to protect their privacy. Instead, the bill should ensure that privacy protections are not just for those who can afford them.
- *Add the prohibition on dark patterns to Part 3.* We appreciate that you have added a prohibition on dark patterns—deceptive user interfaces that can lead consumers to take actions they did not intend to, including to share more personal information—in Parts 1 and 2. However, a similar prohibition should be included in Part 3 as well, to ensure that companies cannot unfairly push consumers into opting back into the sale of their information. Too often, companies often use dubious dark patterns to nudge users to click “OK,” providing the veneer, but not the reality of, knowing consent.<sup>5</sup>
- *Add authorized agent provisions:* The bill should also include the CCPA’s “authorized agent” provision that allows consumers to designate a third party to perform requests on their behalf. Consumer Reports has already begun to experiment with submitting opt-out requests on consumers’ behalf, with their permission, through the authorized agent provisions.<sup>6</sup> Authorized agent services will be an important supplement to platform-level global opt outs. 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.
- *Remove the authentication requirements and restrictions on default opt outs.* While we appreciate the report language with respect to authentication and default signals, we nevertheless recommend deleting the identity verification requirement in Part 3, otherwise much of the data used for ad tracking across the web would be exempted. In addition, the restrictions on default browser privacy signals should be removed. If a consumer selects a privacy-focused browser like Duck Duck Go or Brave, it should be

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<sup>5</sup> *Most Cookie Banners are Annoying and Deceptive. This Is Not Consent*, PRIVACY INTERNATIONAL (last visited Aug. 28, 2020),

<https://privacyinternational.org/explainer/2975/most-cookie-banners-are-annoying-and-deceptive-not-consent>.

<sup>6</sup> 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>.

assumed that they do not want to be tracked across the web, and they should not have to take additional steps to enable a global opt out signal.

- *Remove the right to cure.* The “right to cure” provisions from the administrative enforcement sections of the bill should be removed, as Proposition 24 removed it from the CCPA. 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.

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

cc: Members, Senate Energy, Environment, and Technology Committee