



Representative Monica Duran
200 E. Colfax Ave., RM 307
Denver, CO 80203

Representative Terri Carver
200 E. Colfax Ave., RM 307
Denver, CO 80203

RE: Letter in Opposition to Colorado SB 21-190

Dear Representative Duran and Representative Carter:

On behalf of the advertising industry, we oppose Colorado SB 21-190 as currently drafted,¹ and we offer these comments summarizing our concerns with the proposed legislation.

We and the companies we represent, many of whom are headquartered or do substantial business in Colorado, strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, SB 21-190 contains provisions that could hinder Coloradans' access to valuable ad-supported online services and resources, impede their ability to exercise choice in the marketplace, and harm businesses of all sizes that support the economy.

SB 21-190 would impose significant new costs on Colorado businesses during a time when they are already struggling to rebound from the economic impacts of the COVID-19 pandemic. The bill's onerous and novel provisions could cripple Colorado businesses and diminish their ability to serve state residents. When California enacted the California Consumer Privacy Act of 2018 ("CCPA"), state officials estimated the total costs of *initial* compliance to be 55 billion dollars, with small and mid-sized businesses "likely to face a disproportionately higher share of compliance costs relative to larger enterprises."² Similarly, a study on quickly advancing omnibus privacy legislation in Florida found the total cost of initial compliance would be 36.5 billion, with approximately 20.49 billion of those costs falling to small enterprises with less than 20 employees.³ SB 21-190 would have similar impacts in Colorado. The bill is no more than a vehicle for big government overregulation that has the potential to impose crushing compliance costs on Colorado businesses—particularly small businesses—that support the state's economy and its residents.

Additionally, if enacted, SB 21-190 would take an approach to privacy regulation that is inconsistent with privacy laws in other jurisdictions and in a number of instances would be both onerous for business compliance and counterproductive to fostering clear and meaningful protections

¹ SB 21-190 Reengrossed (Colo. 2021), located [here](#) (hereinafter "SB 21-190").

² State of California Department of Justice, Office of the Attorney General, *Standard Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations* 11, 31 (Aug. 2019), located [here](#).

³ Florida Tax Watch, *Florida's Proposed Privacy Protection Act* at 2 (Mar. 2021), located [here](#).

for consumers. Specifically, we highlight the following issues with the bill, which are discussed in more detail below:

- **SB 21-190 Should Set Forth Safeguards for Global Settings and Universal Opt-Out Mechanisms To Ensure Coloradans' Privacy Choices Are Protected.** The bill does not create any safeguards around global settings and universal opt-out mechanisms to ensure consumer choices are respected and not tampered with by intermediaries. SB 21-190 should include such safeguards.
- **Colorado Should Align Consumers' Right of Access and Right to Deletion with Those Rights in the CCPA.** The General Assembly should take steps to ensure the right of access and deletion apply to personal data collected from a Colorado consumer to facilitate consistency with other state privacy laws.
- **Requiring Opt-In Consent For Any Processing of Sensitive Data Would Impede Consumers From Receiving Critical Messages.** SB 21-190 should be amended so that the requirement to obtain opt-in consent for sensitive data processing does not unreasonably limit legitimate uses of sensitive data that benefit Coloradans immensely.
- **The General Assembly Should Decline to Pass SB 21-190 This Session, As More Time is Needed to Refine Various Provisions of the Bill.** For example, SB 21-190's broad rulemaking authority for the Colorado Attorney General ("AG"), its limited cure period for AG enforcement, and its lack of appropriate exemptions for pseudonymous data would be detrimental to Colorado consumers and businesses alike. The General Assembly should not pass the bill in the waning days of the 2021 legislative session and instead should work towards considering ways to improve the bill for next year.

To help ensure Coloradans can continue to reap the benefits of a robust ad-supported online ecosystem and exercise choice in the marketplace, we recommend that the Colorado General Assembly undertake a study of available approaches to regulating data privacy before moving forward with enacting SB 21-190. More time is needed to refine SB 21-190 so it can create workable and effective privacy standards for Colorado consumers and businesses. To the extent possible, Colorado's approach to privacy should be harmonized with other state privacy laws such as the CCPA and the Virginia Consumer Data Protection Act ("VCDPA") to facilitate consistency in consumer privacy rights and to help clarify obligations for businesses operating across the nation that must comply with new privacy rules. As presently written, SB 21-190 is inconsistent with those other state privacy laws and therefore falls short of creating a regulatory system that will work well for Colorado consumers or businesses.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. These companies range from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies, is responsible for more than 85 percent of the U.S. advertising spend, and drives more than 80 percent of our nation's digital advertising expenditures. We provide the following comments on SB 21-190 along with representatives from the Colorado business community. We look forward to continuing to engage with the General Assembly as it considers SB 21-190.

I. SB 21-190 Should Set Forth Safeguards for Global Settings and Universal Opt-Out Mechanisms To Ensure Coloradans' Privacy Choices Are Protected

As written, the bill would require controllers to honor requests to opt out of personal data sales, personal data processing for targeted advertising, and profiling that are communicated by persons “acting on the consumer’s behalf” through global privacy controls.⁴ However, the bill does not provide any guidelines for controllers to use to determine whether such global privacy controls are truly authorized by the consumer or not. This lack of clarity could enable intermediary companies, like browsers, to set opt-out signals for Coloradans by default, depriving them of the benefits of the ad-supported Internet without ensuring that this decision aligns with the consumer’s true preferences. For instance, one browser recently announced that it would turn on such controls by default and they would be unconfigurable,⁵ thereby assuming that *any consumer* choosing to use the browser has decided to opt out of personal data sales as defined by this legislation. Legal requirements to honor global privacy controls through intermediary technologies, if not clearly stipulating they be genuinely enabled by users, therefore put consumer choice at risk and hinder consumers’ ability to express their actual preferences. The law should define these safeguards rather than assigning responsibility to a rulemaking process. As a result, a requirement to honor global privacy controls should not be included in SB 21-190.

II. The General Assembly Should Decline to Pass SB 21-190 This Session, As More Time is Needed to Refine Various Provisions of the Bill

SB 21-190 contains a number of provisions that, if enacted, would create ineffective privacy protections for consumers, make Colorado inconsistent with other state privacy laws, and harm businesses of all sizes that support Coloradans and the economy. Some examples of such provisions are set forth below. Instead of rushing to pass SB 21-190 in the last few days of the 2021 general session, the Colorado Assembly should consider revisiting this effort in 2022 so more time is available to craft privacy legislation that will work for consumers and businesses.

- A. The Bill’s Lack of an Exemption for Pseudonymous Data Could Hinder Coloradans’ Ability to Access Useful Online Content and Services.** The most recent version of SB 21-190 removed the concept of “pseudonymous data” from the bill, as well as a relevant exception for such data from the bill’s consumer rights. This exemption should be reinstated in SB 21-190. Without such an exemption, Coloradans could lose access to various online products, services, news, music, content, and more. Additionally, an exemption for pseudonymous data from the bill’s consumer rights would align with the approach taken by VCDPA and would therefore help streamline businesses’ data privacy law compliance responsibilities.
- B. The Bill’s Unlimited AG Rulemaking Authority Would Increase Variation With Other State Privacy Laws.** SB 21-190’s broad AG rulemaking authority could exacerbate the inconsistency that already exists amongst state privacy laws by enabling the AG to issue rules that are out of step with privacy regulations in other states. The General Assembly should take steps to place more limitations on SB 21-190’s AG rulemaking authority to foster more consistency across state regimes.

⁴ *Id.* at Section 6-1-1306(1)(a)(II).

⁵ See Brave, *Global Privacy Control, a new Privacy Standard Proposal, now Available in Brave’s Desktop and Android Testing Versions* (Oct. 7, 2020), located at <https://brave.com/global-privacy-control/>.

C. Sunsetting the Cure Period for AG Enforcement Provides No Real Relief to Businesses. Although SB 21-190 contemplates a 60-day cure period for AG enforcement, the bill would sunset the cure period on January 1, 2025, thereby robbing businesses of any reliability in enforcement at that time. A guaranteed cure period would enable businesses to address alleged legal violations appropriately and would incentivize them to do so quickly. The General Assembly should therefore remove the provision that sunsets the AG enforcement cure period to support businesses compliance with privacy law requirements.

III. Colorado Should Align Consumers' Right of Access and Right to Deletion with Those Rights in the CCPA

The General Assembly should alter SB 21-190's right of access so it applies to personal data "collected about the consumer" instead of "the consumer's personal data."⁶ This former formulation of the right of access aligns with other state privacy laws such as the CCPA and would foster consistency across states to the benefit of both consumers and businesses. In addition, Colorado should ensure its deletion right does not apply broadly to any personal data "concerning the consumer" and instead applies to personal data collected "from the consumer."⁷ Permitting a consumer to delete any personal data "concerning" them would create a conflict between the bill and California law, and it would create a requirement that is overly broad. Without this suggested amendment, SB 21-190's deletion right could extend beyond information that is solely associated with the one consumer making a deletion request, thereby impacting the rights of others. Colorado should ensure its deletion right applies to information collected "from" the consumer.

IV. Requiring Opt-In Consent For Any Processing of Sensitive Data Would Impede Consumers From Receiving Critical Messages

The bill would impose an opt-in consent requirement for any processing of sensitive data that, because defined too broadly, would encumber uses of that data that benefit consumers immensely.⁸ Processing the data elements listed in subsection (a) of the bill's "sensitive data" definition helps to service vital public interests, including, for instance, targeting health-related messages to specific communities. For instance, in response to the COVID-19 public health crisis, the type of demographic data contained subsection (a) of the bill's "sensitive data" definition is imperative for obtaining factual information concerning vaccines for underserved communities. The bill, as presently written, would undermine public health efforts to ensure information about the pandemic and vaccines are accessible to all Coloradans. Controllers' ability to process sensitive 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.

In addition, similar to public health messaging, processing the "sensitive data" enables government agencies to advance fair lending and fair housing laws by identifying communities of people who are underserved. Government agencies do not process this information themselves, but they rely on information about the characteristics in "sensitive data" to understand where they should

⁶ SB 21-190 at Section 6-1-1306(1)(b).

⁷ *Id.* at Section 6-1-1306(1)(d).

⁸ *Id.* at Section 6-1-1308(7).

focus efforts to promote fair lending and fair housing. The bill would create obstacles for entities that use sensitive data to advance fair lending and housing efforts.

Finally, SB 21-190's opt-in consent requirement would encumber advertisers from using this data to reach desired audiences with relevant goods, services, and offers, such as magazines, personal care products, and food products. The bill's opt-in consent requirement for sensitive data processing would impede consumers from receiving messaging that is relevant to them. To ensure uses of sensitive data to benefit Coloradans can persist, we suggest that the General Assembly amend the definition of "sensitive data" so the data elements listed in subsection (a) of that definition are treated differently than the data elements listed in subsections (b) through (c). Our suggested amendment to the definition of "sensitive data" is set forth in **Appendix A**.

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We and our members support protecting consumer privacy. However, we believe SB 21-190 would impose new and particularly onerous requirements on entities doing business in the state and would unnecessarily impede Colorado residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider the bill and decline to pass it this session. Instead, the General Assembly should convert SB 21-190 to a study so Coloradans can benefit from the careful consideration of approaches to data regulation that benefit consumers and businesses alike. We stand ready to work with you to draft workable privacy legislation during the 2022 general session.

Thank you in advance for consideration of this letter.

Sincerely,

Dan Jaffe
Group EVP, Government Relations
Association of National Advertisers

Alison Pepper
Executive Vice President, Government Relations
American Association of Advertising Agencies, 4A's

Christopher Oswald
SVP, Government Relations
Association of National Advertisers

David Grimaldi
Executive Vice President, Public Policy
Interactive Advertising Bureau

David LeDuc
Vice President, Public Policy
Network Advertising Initiative

Clark Rector
Executive VP-Government Affairs
American Advertising Federation

APPENDIX A

SUGGESTED AMENDMENT TO COLORADO SB 21-190

6-1-1303. Definitions.

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(23) "SENSITIVE DATA" MEANS:

(a) PERSONAL DATA REVEALING RACIAL OR ETHNIC ORIGIN, RELIGIOUS BELIEFS, A MENTAL OR PHYSICAL HEALTH CONDITION OR DIAGNOSIS, SEX LIFE OR SEXUAL ORIENTATION, OR CITIZENSHIP OR CITIZENSHIP STATUS **WHEN USED TO MAKE DECISIONS THAT PRODUCE LEGAL OR SIMILARLY SIGNIFICANT EFFECTS CONCERNING A CONSUMER;**

(b) GENETIC OR BIOMETRIC DATA THAT MAY BE PROCESSED FOR THE PURPOSE OF UNIQUELY IDENTIFYING AN INDIVIDUAL; OR

(c) THE PERSONAL DATA FROM A KNOWN CHILD.