VIA EMAIL

California State Senate
Senate Democratic Caucus
California State Capitol
1303 10th Street
Sacramento, CA 95814


Re: ASSEMBLY BILL 375 (AS AMENDED) – {OPPOSE}

Media Alliance writes to you, regretfully, to ask you to oppose the last minute deal to rush through broadband privacy legislation prior to June 28th in order to remove the California Consumer Privacy Act from the fall ballot. We do this in spite of the fact that we are quite eager and in fact somewhat desperate for the Legislature to act on online privacy. It saddened us greatly to see Assembly Bill 375 left inactive on the Senate floor last year. But in some cases, no legislation at all is better than bad legislation, and in this case, on both procedural and substantive grounds, we believe the Senate Democratic Caucus, with all due respect to the hard work put in by Senator Hertzberg and no doubt others to broker a last minute deal, should NOT support this.

Media Alliance is a Bay Area democratic communications advocate. Our members include professional and citizen journalists and community-based media and communications professionals who work with the media and on various digital platforms powered by the Internet. Online privacy is of great importance to our members.

I - BACKGROUND

The need for the Legislature to act, like many hot-button issues this legislative season, has been exacerbated by the dubious actions of the federal government and the current administration, which rushed through a Congressional Review authority to revoke the FCC's privacy protocol, leaving nothing in its place as privacy issues exploded in a series of crises ranging from the Equifax data leaks to the Cambridge Analytica scandal. The net effect has been a substantial increase in the number of Americans and Californians worried about the security of their data and wanting to be able to consent to the sharing and selling of it.

The original version of Assembly Bill 375 recreated the 2016 protocol put together by the Obama-era Federal Communications Commission on a gut and amend bill put together by Assembly Privacy chair Ed Chau.
The bill stalled on the Senate floor last year, despite its basic sanction by the last Democratic presidential administration, and according to Assemblymember Chau, it still did not have sufficient support among your caucus to advance this year. I was disappointed to hear that, but as always, things must be politically viable and garner broad support and clearly that isn’t the case at this time.

In response to the failure of AB 375, a San Francisco real estate developer Alistair MacTaggart spent a great deal of money to qualify a ballot initiative called the California Consumer Privacy Act (CCPA) and gathered 603,000 signatures from California residents who wished to vote on it in November.

The ballot initiative did not replicate the exact language of the 2017 version of AB 375. It weakened it considerably. However, it still maintained some desirable provisions.

However, the amended bill in front of you in this expedited process does not replicate the language of the ballot initiative that 603,000 Californians asked to be able to vote on in November. It weakens that weaker version considerably more.

II – THIS LAST MINUTE DEAL LACKS TRANSPARENCY AND CHEATS THE PUBLIC

The request put in front of you is to deny those 603,000 Californians their opportunity to express their preferences by eliminating not only their right and request to vote on consumer privacy regulation, but not even giving a hearing to the language they endorsed for the ballot.

It is our belief this is morally and procedurally wrong, and profoundly so. The Legislature had its opportunity to hear, debate, discuss and amend the bill language of Assembly Bill 375 in both the 2017 and the 2018 legislative session. The Legislature did not choose to do so.

Now the proposal is to jump into an expedited and abbreviated six-day process that not only pre-empts a ballot initiative vote that collected over 600,000 signatures, but allows the public virtually no chance to evaluate the newly amended language and convey their support or opposition for it.

This is not transparent public policy making nor is it a sound legislative process. With all of our eagerness for consumer privacy regulation, this is something that we cannot organizationally endorse.

We sincerely ask you to allow the public to have their say, as they have requested, and if they do not choose to make CCPA state law, then the Legislature can take up the issue in an orderly fashion in the 2019 Legislative session. This last-minute ramming is disrespectful to Californians and is putting forward new bill language that has not been vetted by significant stakeholders nor subjected to meaningful discussion and debate.

III – CODIFYING PRICE DISCRIMINATION FOR PRIVACY IS PROBLEMATIC

In addition to the procedural dubiousness, there are substantive problems with the new amended language that differ from the ballot initiative language. These problems are not unsolvable, but cannot be addressed in six days, so the process proposed will have the effect of codifying into law some unfortunate clauses and conditions that will worsen the plight of consumers.

Among them would be the first and only privacy legislation in the country to permit differentiated pricing based on a customer’s privacy preferences. Section 1798.125 (b) 1 states:
A business may also offer a different price, rate, level, or quality of goods or services to the consumer if that price or difference is directly related to the value provided to the consumer by the consumer’s data.

This language refers to pay-for-privacy-pricing-plans that make it financially disadvantageous to choose to opt out of authorizing data sales, essentially turning consumer privacy into a luxury for the affluent and a financial burden to the poor.

If the Legislature plans to make consumer privacy a consumable item to be purchased for a price, rather than a right for everyone, it should at least make that proposal in an open forum. To rush it through without even a public hearing is a severe disservice to California consumers, who will only find out they can now have privacy at a price after the fact.

**IV – SHARING DATA LANGUAGE HAS BEEN ELIMINATED**

Another substantive change from the ballot initiative language eliminates consent for any transfer of data for which valuable consideration is not provided. In other words, consumers may opt out of the sale of their data, but not opt out of the sharing of their data.

The language in the ballot initiative is:

“sharing orally, in writing, or by electronic or other means, a consumer's personal information with a third party, whether for valuable consideration or for no consideration, for the third party's commercial purposes.”

That has been changed to:

“Sell,” “selling,” “sale,” or “sold,” means selling, 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 another business or a third party for monetary or other valuable consideration.

This is potentially a significant loophole that can easily be manipulated by bad actors who can tie consideration to business transactions other than data transfers and then release themselves from the bill's requirements to permit consumers to opt out.

To codify this into law without amendment is problematic.

**V – CONSUMERS RIGHT TO REMEDIATION IS ABSOLUTELY LIMITED**

Unlike the ballot initiative, the new version of AB 375 absolutely restricts the right of any California consumer to pursue injunctive relief via the courts in the event of a breach of their own personal information by giving the Attorney General the unfettered ability to block them from pursuing a civil action.

1798.150(b)(3)(C) allows the AG to block any private action with no need to provide any reason and with no constraints. This essentially means that consumers do not own their data and the consent the bill offers is not absolute and can be abrogated by the State at any time.
Again this is a significant change from the ballot initiative language, one that deeply affects consumers, and has been unvetted and submitted to no public discussion and debate.

V- CONCLUSION

Speaking for myself in my capacity as an advocate, I saw these amendments for the first time on Friday June 22, I am told the Governor will sign this bill by June 28 or this upcoming Thursday. I have been left with no choice but to write this letter on my weekend, email it to all of you in the hope that someone just might read it prior to voting on the bill, although I am not convinced anyone actually will. And I have no time to inform my constituents what is in the bill and what they can do if they wish to weigh in as Californians, although they expect me to inform them on privacy and telecom issues. Basically, what I have to tell them is that they can do nothing.

Please reject this process as inadequate, whatever your analysis of the substantive nature of the bill. While it seems clear there are amendments to the language that many will find distasteful, the real problem here is procedural and for that there is no remedy.

Californians should not be told that major public policy changes that affect their daily lives will be jammed down their throat in a back room process with no public-facing discussion.

That is always and without question, the wrong way to go about regulating consumer privacy, or anything else.

Please vote no on AB 375 as amended.

Sincerely,

Tracy Rosenberg

Tracy Rosenberg
Executive Director
Media Alliance
2830 20th Street # 102
San Francisco CA 94110
Website: www.media-alliance.org