Consumer Federation of America
1620 I Street, N.W., Suite 200 * Washington, DC 20006

January 29, 2020

Senator Christine Rolfes, Chair
Washington State Senate Ways and Means Committee
311 J.A. Cherberg Building
P.O. Box 40466
Olympia, WA 98504-0466

VIA EMAIL

RE: OPPOSE SB 6281

Dear Senator Rolfes:

Consumer Federation of America, an association of consumer organizations across the United States advocating for the interests of millions of people in your state and across America, opposes SB 6281, the Washington Privacy Act, in its current form. As advances in technology have made it easier to collect, analyze, and use consumers' personal information for commercial purposes, often without their knowledge or control, privacy has emerged as a major concern. It is appropriate and necessary for states to act to address this concern, and we applaud you for considering legislation to do so.

However, SB 6281 would do little to change business practices built on exploiting individuals' personal information for profit or provide meaningful privacy protections for Washingtonians. "Big Tech" companies are pushing this legislation as part of a campaign to ensure that if a federal privacy law preempting the states is not enacted, state privacy bills will be to their liking. They want the Washington State law to be a model for other states to follow. We share that desire, but this is not the model we seek. Washington State can do better. Rather that rushing this legislation through, we urge legislators to push the "pause" button and work with us to craft a bill that puts individuals' human and privacy rights front and center.

We understand that the legislation is being likened to the EU General Data Protection Regulation. It fails, however, to incorporate one of the most fundamental elements of the GDPR, the requirement that each entity that is processing consumers' data must have a "lawful basis" for doing so. Fulfilling the consumer's request, doing something with the consumer's specific consent, and complying with legal requirements are some examples of a lawful basis. Commercial interests can also be a lawful basis, but they must be balanced against the privacy

interests of the individual, which may outweigh them. Businesses cannot simply rely on the fact that they have stated the purposes of processing in their privacy policies to do what they wish with the data. Moreover, there is generally no need for Europeans to "opt-out" to prevent or limit processing. Rather, the burden is on the data controller to justify what it is doing. In reviewing the initial version of this legislation, we urged Senator Carlyle to flip the default to one in which the data controller must obtain the consumer's affirmative consent for *any* processing outside of what is necessary to fulfill the person's request, prevent fraud, comply with legal requirements, and for other purely operational purposes. That would shift the burden where it belongs and represent real progress in protecting consumers' privacy.

Even if the opt-out model on which this bill is based were to remain, consumers' ability to opt-out of processing is unduly limited. Consumers should be able to opt-out of *any* processing that is not needed for purely operational purposes (and those purposes should not include "improving our products and services," which is not consumers' responsibility).

One of our biggest concerns is that the legislation would facilitate the use of facial recognition technology. As you may know, numerous studies have shown that it can produce inaccurate results, often biased against people of color. There are also serious questions about how feasible it is to rely on consumer consent for its use, especially in public settings. Organizations across the country are now urging a ban on face surveillance. Provisions concerning facial recognition should be removed from this bill.

Another major concern is the lack of strong enforcement, especially the fact a private right of action is explicitly denied in the legislation. This is one of the most serious defects in the new California privacy statute, a mistake that other states should not replicate. The Washington Attorney General's Office cannot and will not bring legal action in every case in which individuals believe that their privacy rights have been violated. Mollifying Big Tech's concerns about being sued by preventing people from enforcing their rights shifts the balance of power much too far. Private rights of action enable consumers to remedy their individual problems and also often result in changes to business practices that benefit us all. They are a necessary tool in the enforcement arsenal and should be provided for in this legislation. In addition, the Attorney General is going to need resources beyond what it can recoup for the cost of investigations and prosecutions in order to have the necessary tools and expertise to fulfill its mandates under the statute.

We have many other concerns about the legislation, including but not limited to:

- The narrow definition of "sale," which does not adequately encompass the variety of ways in which consumers' personal information is monetized.
- The treatment of affiliates, which should be subject to the same provisions as third parties.

- The exemptions for entities that are covered by HIPPA, GLBA or COPPA. Each of these federal statutes allows states to provide stronger protections for financial, health and children's information, respectively.
- The narrowing of the nondiscrimination provision to actions that would violate state or federal anti-discrimination laws. We are also concerned about the overly-broad exception for loyalty programs.
- The secrecy of data protection assessments, which the public cannot access and thus will have limited impact and usefulness.
- The lack of controllers' or processors' accountability when they disclose data to other parties if they did not know that those parties intended to violate the law. This is an impossible burden of proof to meet and would, as an example, leave Facebook unaccountable for the actions of Cambridge Analytica.

You have the opportunity to enact legislation that will provide meaningful privacy rights for your constituents and lead the way for other states. Getting it right is better than doing it fast.

The legislature could create a taskforce with balanced representation of stakeholders to work on a bill for the next session. This would demonstrate your commitment to protecting Washingtonians' privacy and lead to a better end product. We ask that this letter be included in the record of your proceedings on this bill and will be happy to provide assistance as you consider how to move forward.

Sincerely,

Susan Grant
Director of Consumer Protection and Privacy
Consumer Federation of America

CC: Committee Members and Staff