June 28, 2023

The Honorable Craig J. Coughlin
569 Rahway Avenue
Woodbridge, NJ 07095

Re: S332/A1971 - Concerns

Dear Speaker Coughlin:

BSA | The Software Alliance[1] supports strong privacy protections for consumers and appreciates the legislature's work to improve consumer privacy. In our federal and state advocacy, BSA works to advance legislation that ensures consumers' rights — and the obligations imposed on businesses — function in a world where different types of companies play different roles in handling consumers' personal data. At the state level, we have supported strong privacy laws in a range of states, including consumer privacy laws enacted in Colorado, Connecticut, and Virginia.

BSA is the leading advocate for the global software industry. Our members are enterprise software and technology companies that create the business-to-business products and services to help their customers innovate and grow. For example, BSA members provide tools including cloud storage services, customer relationship management software, human resource management programs, identity management services, and collaboration software. Businesses entrust some of their most sensitive information — including personal information — with BSA members. Our companies work hard to keep that trust. As a result, privacy and security protections are fundamental parts of BSA members' operations, and their business models do not depend on monetizing users' data.

BSA is concerned that SB332/A1971 fails to recognize the distinct roles of businesses and service providers, which play different roles in safeguarding consumers' data. All eleven

[1] BSA's members include: Adobe, Alteryx, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, Databricks, DocuSign, Dropbox, Elastic, Graphisoft, IBM, Informatica, Juniper Networks, Kyndryl, MathWorks, Microsoft, Okta, Oracle, Prokon, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

200 Massachusetts Avenue, NW
Suite 310
Washington, DC 20001

P 202-872-5500
W bsa.org

states to enact comprehensive consumer privacy legislation reflect the longstanding and widespread distinction between these two types of companies, which are sometimes also called controllers and processors. Instead, SB332/A1971 applies to "operators" — a term that can conflate these different roles. We encourage the legislature to amend the bill to address these concerns and to clarify that service providers, as defined by the bill, are not "operators."

In our view, both businesses and service providers should be covered by comprehensive privacy legislation — but the obligations created in the bill must reflect these different roles. Indeed, the distinction between these two types of companies has been recognized for more than 40 years and is foundational to privacy laws not only in the states but worldwide.[2] In addition, as the legislature continues its work on SB332/A1971, we also encourage you to harmonize the structure and scope of consumer privacy legislation with existing state privacy laws more broadly.

Distinguishing Between Businesses (Operators) and Service Providers Benefits Consumers.

As SB332/A1971 recognizes, a "service provider" is a company that maintains and processes personal data on behalf of another business. For example, a cloud computing company often acts as a service provider to a range of businesses, which use its cloud services to store, analyze, and process the personal data they collect from their customers. The cloud computing company processes that personal data on behalf of the other businesses, but those other businesses decide when to collect personal data from their customers and how it will be used.

Both service providers and businesses should have strong obligations to safeguard consumers' data — but those obligations must reflect their different roles in handling that data. Indeed, all states with comprehensive consumer privacy laws recognize this critical distinction and assign important, but distinct, obligations to both service providers and businesses. In California, the state privacy law refers to these companies as businesses and service providers, while all other state comprehensive privacy laws use the terms controllers and processors.[3]

---

[2] BSA | The Software Alliance, Controllers and Processors: A Longstanding Distinction in Privacy, available at https://www.bsa.org/policy-filings/controllers-and-processors-a-longstanding-distinction-in-privacy.

[3] *See, e.g.,* Cal. Civil Code 1798.140(d, ag); Colorado's CPA Sec. 6-1-1303(7, 19); Connecticut DPA Sec. 1(8, 21); Florida Digital Bill of Rights Sec. 501.702((9)(a)(4)); Iowa Senate File 262 (715D.1(8, 21); Indiana Senate Enrolled Act No. 5 (Chapter 2, Sec. 9, 22); Montana Consumer Data Privacy Act Sec. 2(8,18); Tennessee Information Protection Act 47-18-3201(8, 19); Texas Data Privacy and Security Act Sec. 541.001(8, 23); Utah CPA Sec. 13-61-101(12, 26); Virginia CDPA Sec. 59.1-575.

200 Massachusetts Avenue, NW
Suite 310
Washington, DC 20001

P 202-872-5500
W bsa.org

Recommendation: We recommend amending the definition of "Operator" in SB 332/A1971 to align with the definition of a business or controller under other state privacy laws, by stating:

"Operator" means a person or entity that determines the purposes and means of processing the personally identifiable information of a consumer and operates a commercial Internet website or an online service. "Operator" shall not include any third party that operates, hosts, or manages, but does not own, a commercial Internet website or online service on the operator's behalf, or any service provider that processes information on behalf of the operator.

This revision would adopt the same dividing line between operators and service providers that is used in all comprehensive consumer state privacy laws. All comprehensive state privacy laws define businesses or controllers as the companies that determine the "purposes and means" of processing consumers personal data. In other words, these companies decide how and why a consumer's personal data will be processed. This revision would clearly define operators as these decision-making companies and separate them from service providers, which do not decide how and why to process a consumer's data but instead handle that data on behalf of another company.

Our recommendation also appears to align with the intent of SB 332/A1971, because the legislation already includes a separate definition of service provider. Revising the definition of "operator" as we recommend makes clear that operators and service providers are two separate categories of companies – both of which are covered by the legislation.

SB 332/A1971 Should Promote Interoperability with Other State Laws.

We appreciate the legislature's focus on creating a narrow privacy law that is right for New Jersey. While states will naturally develop laws that are different in how they protect consumers, we want to emphasize the value of building a set of state privacy laws that work together and share core structural commonalities. This approach not only helps businesses understand how their obligations change across jurisdictions – and map those obligations to one another — but also creates a broader set of shared expectations among consumers.

As the legislature continues to consider SB 332/A1971, we encourage you to prioritize harmonizing the structural and scoping aspects of the legislation with other leading state privacy laws — and ensure that where New Jersey departs from those other laws it does so in a manner that makes a meaningful contribution to the larger landscape in protecting consumers, rather than diverging without a clear advantage for consumer privacy.

200 Massachusetts Avenue, NW
Suite 310
Washington, DC 20001

P 202-872-5500
W bsa.org

We welcome an opportunity to further engage with you or a member of your staff on these important issues.

Sincerely,

Matthew Lenz
Senior Director and Head of State Advocacy
CC: Assemblymember Raj Mukherji; Senator Troy Singleton;

200 Massachusetts Avenue, NW
Suite 310
Washington, DC 20001

P 202-872-5500
W bsa.org