CTLC's Technical Paper Regarding
HB 969 and SB 1734
Dated: 3/3/2021

This is a technical paper from the Data Privacy Task Force of the Computer and Technology Law Committee, which is part of the Business Law Section of the Florida Bar, relating to HB 969 and SB 1734. Broadly stated, those bills regulate the collection and use of personal information of Florida residents by businesses, wherever located, doing business in this state. We understand HB 969 and SB 1734 are influenced by—and in many ways patterned after—California's Consumer Privacy Act ("CCPA") and the California Privacy Rights Act ("CPRA").

We reviewed the proposed bills and write to recommend changes to address the concerns of our members, who are practitioners and educators knowledgeable of data privacy and cybersecurity law with years of experience assisting clients and businesses achieve compliance under the CCPA (and before that, Europe's GDPR). We recommend the following changes:

Recommended Change #1:

There appears to be a typographical error, whereby lines 729-735 of HB 969 repeat at lines 736-735. We recommend deleting the duplicate language:

730 2. Retaining, using, or disclosing the personal

731 information for any purpose other than the specific purpose of

732 performing the services specified in the contract, including

733 retaining, using, or disclosing the personal information for a

734 commercial purpose other than providing the services specified

735 in the contract.

736 3. Retaining, using, or disclosing the personal

737 information for any purpose other than for the specific purpose

738 of performing the services specified in the contract, including

Recommended Change #2 – Private Cause of Action:

Both bills provide a private cause of action similar to the CCPA/CPRA. Under the CCPA/CPRA, a private cause of action is limited to data breaches involving personal information as defined in California's data breach notification law. The reason the CCPA/CPRA was so limited was to only provide for a private right of action where the personal information breached may lead to identity theft or other tangible harms.

However, private actions under HB 969 and SB 1734 are not so limited. Under the Florida bills, a consumer could sue a business in Florida for having improperly shared a log file containing internet protocol addresses (defined as Personal Information in both bills). That same action does not exist under the CCPA/CPRA as internet protocol ("IP") addresses are not personal information under that state's breach notification statute. This comports with how IP addresses work technologically, as an IP address only identifies a particular computer or network, not an individual user. If left as-is, these bills would materially deviate from the CCPA/CPRA and likely result in more lawsuits being filed in Florida than in California because more cases would qualify under our broader private cause of action.

To remedy this, we recommend modifying lines 892-893 as follows:

891 (12) PRIVATE CAUSE OF ACTION.—A consumer whose

892 nonencrypted and nonredacted personal information, **as defined in s. 501.171(1)(g),** or e-mail

893 address, in combination with a password or security question and

894 ~~answer that would allow access to the account,~~ is subject to an

Similar changes could be made to SB 1734 at lines 556-564.

We further note that it is *not* necessary to include reference to email addresses in combination with a password or security question (as HB 969 presently does), because that type of information is already included within Florida's definition of personal information under section 501.171(1)(g) as currently defined.

Recommended Change #3 - Conflicts:

Both HB 969 and SB 1734 appear to be in conflict with section 501.171(10), which expressly precludes a private cause of action for violations under the state's data breach notification statute.

If the intent of the proposed bills was to create a cause of action that did not exist before, then section 501.171 should further be amended by striking subsection 501.171(10). Otherwise, we recommend adding language to the bills to help explain how a private cause of action may exist under them but is precluded under section 501.171.

Recommended Change #4 – Statutory Damages:

HB 969 and SB 1734 provide for statutory damages in amounts between $100 and $750 per consumer per incident, or actual damages, whichever is greater. The CCPA/CPRA provides additional language to assist courts (and parties generally) in assessing the amount of statutory damages. To remain consistent with the CCPA/CPRA, we recommend adding that language between lines 905 and 906 (for HB 969):

"(c) In assessing the amount of statutory damages, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature

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and seriousness of the misconduct, the number of violations, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth."

We also recommend making the following change to line 901 to make clear the reference to language pertains to statutory damages:

"(a) Statutory ~~D~~damages in an amount not less than ...."

These same changes should be made to SB 1734 at lines 558 (add "Statutory") and between lines 564 and 565 (insert above language as new subsection (e)).

Recommended Change #5 – Business Thresholds:

HB 969 and SB 1734 define "business" using the same language. There are three thresholds, any one of which would qualify an entity as a "business" subject to the law. The second qualification is that an entity that buys, receives, sells or shares personal information of 50,000 or more consumers (i.e., Florida residents), households or devices per year.

This is not a large number. 50,000 consumers divided by 365 days in a year equates to only 137 unique IP addresses from Florida residents per day. The CCPA/CPRA recently changed this by increasing this threshold to 100,000 consumers/households/devices per year. We recommend the same change by modifying line 138 (HB 969) and line 102 (SB 1734) to be consistent with the CCPA/CPRA, raising the business threshold to 100,000.

Recommended Change #6 – Effective Date:

Our final recommendation concerns the effective date. HB 969 has an effective date of January 1, 2022. SB 1734 has an effective date of July 1, 2021.

Both the GDPR and the CCPA gave businesses two (2) years to come into compliance, because compliance takes time. Some businesses will be creating data

inventories to understand what personal information they have, share, and sell for the first time. A short effective date invites lawsuits, even against companies attempting compliance, and would deter rather than encourage compliance.

To align with the CPRA, which will supersede many parts of the CCPA in January 2023, we recommend revising the effective date on line 922 (HB 969) and line 581 (SB 1734) to January 1, 2023 (about 18 months) to align with the implementation date of the CPRA.