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NetChoice

July 1, 2020

The Honorable Lindsey Graham  
Chairman  
Senate Judiciary Committee  
Washington, DC 20510

The Honorable Richard Blumenthal  
Member  
Senate Judiciary Committee  
Washington, DC 20510

*Re: Requesting Delay of Markup of S. 3398*

Dear Chairman Graham and Senator Blumenthal:

The undersigned associations continue to have concerns that S. 3398's overbreadth will impair lawful speech and conduct, threaten the privacy of law-abiding citizens, hinder law enforcement's efforts against online child exploitation, and limit innovation.<sup>1</sup> While we have these serious concerns, industry is committed to the elimination of online child exploitation. We look forward to working with members in the Senate to address these concerns constructively. Because of the important nature of this discussion and to thoroughly review the amendments and provide feedback, we respectfully request a delay of tomorrow's planned markup of S. 3398.

The technology sector takes seriously its responsibility to address harmful content online, including child sexual abuse material (CSAM). Pursuant to existing federal criminal law addressing CSAM, industry works proactively to remove and report harmful content and routinely engages with law enforcement to assist and respond to valid requests for information pertaining to criminal activity online.<sup>2</sup> Industry invests significant resources in addressing these important issues.<sup>3</sup> We support these issues receiving greater emphasis from law enforcement. While industry makes tens of millions of CSAM reports to authorities every year, fewer than 1500 prosecutions have occurred per year, and that number has declined in recent years.<sup>4</sup>

Notwithstanding potential amendments, we remain concerned by the bill's proposed creation of a government-funded commission to recommend voluntary "best practices" to which private-sector Internet services may adhere — likely suggesting design choices that would undermine the privacy and security interests of users, including children. Compliance with these "best practices" or related state laws could create a multitude of open-ended bad results ranging from restricting encryption leading to less safe online environments for children and other users, mandating data retention which may open companies to potential suits as "state" actor for purposes of the Fourth Amendment, to implementing age-rating and -gating systems which have

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<sup>1</sup> The undersigned associations expressed concerns in a letter when the bill was introduced. Letter from CCIA, CTA, IA, i2Coalition, and NetChoice, Concerns with Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (Mar. 5, 2020), *available at* <https://www.ccianet.org/wp-content/uploads/2020/03/Tech-Assn-EARNIT-Letter.pdf>.

<sup>2</sup> 18 U.S.C. § 2258A.

<sup>3</sup> For example, the Technology Coalition recently announced Project Protect, a plan to combat CSAM online. The Technology Coalition Announces Project Protect (June 10, 2020), <https://www.technologycoalition.org/2020/05/28/a-plan-to-combat-online-child-sexual-abuse/>.

<sup>4</sup> See Table D-2—U.S. District Courts—Criminal Federal Judicial Caseload Statistics (Mar. 31, 2020), <https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2020/03/31>.

limited relation to the elimination of CSAM and could potentially violate the First Amendment. Implementation therefore, albeit voluntary, could result in the application of the state actor doctrine to providers' existing moderation activities, making it harder to prosecute criminal activity.<sup>5</sup>

Industry is also concerned with Section 5 of the Manager's Amendment which would exempt laws targeted at CSAM from intermediary protections. This has the potential to create a scenario where companies are subject to an additional patchwork of state laws with varying scienter requirements, making it more difficult for companies to have certainty in their efforts to combat objectionable third-party content.

Finally, among other things, we remain concerned by the bill's implications for companies' ability to design secure and trustworthy products and services. Strong encryption is critical for national security, a vibrant and competitive digital economy, and the online and physical safety of individuals, including children.

We invite the opportunity for further debate and discussion on these critical issues. In light of the fact that more time would be useful to discuss the implications of amendments, we recommend delay of tomorrow's planned markup. While we have concerns about S. 3398, we are committed to addressing harmful content online, including CSAM, and look forward to working with you to address these serious issues.

Sincerely,

Computer & Communications Industry Association  
Consumer Technology Association  
Internet Infrastructure Coalition  
NetChoice

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<sup>5</sup> Chris Marchese, *The EARN IT Act's Collision Course With The Fourth Amendment* (NetChoice June 2020), <https://netchoice.org/wp-content/uploads/2020/06/EARN-It-4A-Report-FINAL.pdf>.