

October 18, 2023

Senator Barry R. Finegold
24 Beacon St.
Room 511-A
Boston, MA 02133

Representative Jerald A. Parisella
24 Beacon St.
Room 42
Boston, MA 02133

Senator Liz Miranda
24 Beacon St.
Room 519
Boston, MA 02133

Representative Andres X. Vargas
24 Beacon St.
Room 36
Boston, MA 02133

RE: Massachusetts Information Privacy and Security Act (S. 227 / H. 60) – Oppose

Dear Sen. Finegold, Sen. Miranda, Rep. Parisella, and Rep. Vargas:

On behalf of the advertising industry, we write to oppose S. 227 / H. 60, the “Massachusetts Information Privacy and Security Act” (“MIPSA”).¹ As described in more detail below, the bill contains several provisions that would hinder consumers’ access to free and low-cost products and services and would impose significant compliance hurdles for businesses. Moreover, the overall legislative approach in the bill is out-of-step with other state privacy laws. We ask the General Court to decline to advance the bill any further in the legislative process and to instead look to harmonize its approach to privacy with other state privacy laws.

As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. These companies range from small businesses to household brands, long-standing and emerging publishers, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product (“GDP”) in 2020.² By one estimate, over 200,000 jobs in Massachusetts are related to the ad-subsidized Internet.³ We would welcome the opportunity to engage with you further on the non-exhaustive list of issues with MIPSA we outline here.

I. Massachusetts Should Take Steps to Harmonize its Approach to Privacy with Other State Laws

A patchwork of differing privacy standards across the states creates significant costs for businesses and consumers alike. Efforts to harmonize draft privacy legislation with existing privacy laws are critical to minimizing costs of compliance and fostering similar privacy rights for consumers no matter where they live. One way that MIPSA presently diverges from existing state privacy laws is by providing opt-out rights for “sales” of personal information, “targeted cross-contextual advertising,”

¹ Massachusetts S. 227 / H. 60 (193rd Gen. Court, 2023), located [here](#) and [here](#) (hereinafter, “MIPSA”).

² John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located at https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf (hereinafter, “Deighton & Kornfeld 2021”).

³ *Id.* at 127-28.

and “targeted-first party advertising,” as defined.⁴ The bill’s definition of “sale” is not aligned with the definition of the term in other states. Additionally, no other state privacy law extends opt-out rights to first party activities. MIPSAs also includes a requirement for covered entities to assert a lawful basis of processing personal information—a nebulous European privacy concept that has proven confusing to interpret and operationalize for businesses in the E.U. and does not reflect any U.S. privacy law.⁵

In addition to the fact that MIPSAs terms diverge sharply from other state privacy laws, the bill also permits the Massachusetts Attorney General (“AG”) to issue regulations to implement the bill’s provisions.⁶ Permitting a state agency to issue regulations to further expound on the requirements in the bill will lead to more divergence in Massachusetts’ privacy standards rather than unifying standards across the nation. The bill should be updated to remove the AG’s regulatory authority to further the goal of maintaining consistency across state privacy requirements.

Compliance costs associated with divergent privacy laws are significant. To make the point: a regulatory impact assessment of the California Consumer Privacy Act of 2018 concluded that the initial compliance costs to California firms would be \$55 billion.⁷ Another recent study found that a consumer data privacy proposal in a different state considering privacy legislation would have generated a direct initial compliance cost of \$6.2 billion to \$21 billion and an ongoing annual compliance costs of \$4.6 billion to \$12.7 billion for the state.⁸ Other studies confirm the staggering costs associated with varying state privacy standards. One report found that state privacy laws could impose out-of-state costs of between \$98 billion and \$112 billion annually, with costs exceeding \$1 trillion dollars over a 10-year period, and with small businesses shouldering a significant portion of the compliance cost burden.⁹ Massachusetts should not add to this compliance bill for businesses and should instead opt for an approach to data privacy that is in harmony with already existing state privacy laws.

II. MIPSAs Data Broker Notice and Consent Requirements Should Be Updated to Reflect the Realities of the Online Ecosystem

MIPSA would prohibit a data broker who received personal information through a sale from further processing that personal information for the purpose of sales or targeted cross-contextual advertising unless the consumer has received “explicit notice” and is provided an opportunity to opt-out of that sale.¹⁰ In general, third parties do not have a direct relationship with consumers, and therefore have no way to effectively provide this notice and opt-out opportunity. Therefore, this requirement could shut off the ability of third parties to participate in the digital marketing ecosystem, undermining competition in the marketplace and lowering the availability of goods and services to

⁴ MIPSAs at Sec. 8(a).

⁵ *Id.* at Sec. 6.

⁶ *Id.* at Sec. 25(u).

⁷ See State of California Department of Justice Office of the Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations*, 11 (Aug. 2019), located at https://www.dof.ca.gov/Forecasting/Economics/Major_Regulations/Major_Regulations_Table/documents/CCPA_Regulations-SRIA-DOF.pdf.

⁸ See Florida Tax Watch, *Who Knows What? An Independent Analysis of the Potential Effects of Consumer Data Privacy Legislation in Florida*, 2 (Oct. 2021), located at <https://floridataxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986>.

⁹ Daniel Castro, Luke Dascoli, and Gillian Diebold, *The Looming Cost of a Patchwork of State Privacy Laws* (Jan. 24, 2022), located at <https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws> (finding that small businesses would bear approximately \$20-23 billion of the out-of-state cost burden associated with state privacy law compliance annually).

¹⁰ MIPSAs at Sec. 8(d).

consumers. Even states such as California have recognized that data brokers do not have a direct touchpoint with consumers to provide requisite notices and opt-out opportunities, and has adopted other reasonable mechanisms for data brokers to meet notice and choice requirements.¹¹

To avoid the unintended consequence of stopping third parties from participation in the market, we urge the General Court to remove the requirement for data brokers to provide this notice and opt-out, or, alternatively, to permit data brokers to rely on contractual assurances with their customers who have direct relationships with consumers to satisfy this requirement. This would involve a business that provides data to a third party representing, and the third party relying on those representations, that the consumer was provided “explicit notice” of further personal information sales at the time of collection. Such a clarification would allow the direct consumer touchpoint to provide consumers with the bill’s required notices, and allow competition and consumer benefits to continue to flow from third-party data use.

III. A Private Right of Action Is an Inappropriate Form of Enforcement for Privacy Legislation

As presently drafted, MIPSAs allow for private litigants to bring lawsuits.¹² We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the AG alone, because such an enforcement structure would lead to stronger outcomes for Massachusetts residents while better enabling businesses to allocate resources to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements. AG enforcement, instead of a private right of action, is in the best interests of consumers and businesses alike.

The private right of action in MIPSAs will create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions will flood Massachusetts’ courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm.¹³ Private right of action provisions are completely divorced from any connection to actual consumer harm and provide consumers little by way of protection from detrimental data practices.

Additionally, a private right of action will have a chilling effect on the state’s economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of law. Private litigant enforcement provisions and related potential penalties for violations represent an overly punitive scheme that do not effectively address consumer privacy concerns or deter undesired business conduct. They expose businesses to extraordinary and potentially enterprise-threatening costs for technical violations of law rather than drive systemic and helpful changes to business practices. A private right of action will also encumber businesses’ attempts to innovate by threatening companies with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies. The threat of an

¹¹ Cal. Code Regs. tit. 11, § 7012(i).

¹² MIPSAs at Sec. 26.

¹³ A select few attorneys benefit disproportionately from private right of action enforcement mechanisms in a way that dwarfs the benefits that accrue to the consumers who are the basis for the claims. For example, a study of 3,121 private actions under the Telephone Consumer Protection Act (“TCPA”) showed that approximately 60 percent of TCPA lawsuits were brought by just forty-four law firms. Amounts paid out to consumers under such lawsuits proved to be insignificant, as only 4 to 8 percent of eligible claim members made themselves available for compensation from the settlement funds. U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* at 2, 4, 11-15 (Aug. 2017), located [here](#).

expensive lawsuit may force smaller companies to agree to settle claims against them, even if they are convinced they are without merit.¹⁴

Beyond the staggering cost to Massachusetts businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based on differing court outcomes. Overall, a private right of action would serve as a windfall to the plaintiff's bar without focusing on the business practices that actually harm consumers. We therefore encourage legislators to remove the private right of action from the bill and replace it with a framework that makes enforcement responsibility the purview of the AG alone.

IV. The Data-Driven and Ad-Supported Online Ecosystem Benefits Massachusetts Residents and Fuels Economic Growth

Over the past several decades, data-driven advertising has created a platform for innovation and tremendous growth opportunities. A recent study found that the Internet economy's contribution to the United States' GDP grew 22 percent per year since 2016, in a national economy that grows between two to three percent per year.¹⁵ In 2020 alone, it contributed \$2.45 trillion to the U.S.'s \$21.18 trillion GDP, which marks an eightfold growth from the Internet's contribution to GDP in 2008 of \$300 billion.¹⁶ Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet in 2020, 7 million more than four years prior.¹⁷ More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.¹⁸ The same study found that the ad-supported Internet supported 217,220 full-time jobs across Massachusetts, more than double the number of Internet-driven jobs from 2016.¹⁹

A. Advertising Fuels Economic Growth

Data-driven advertising supports a competitive online marketplace and contributes to tremendous economic growth. Overly restrictive legislation that significantly hinders certain advertising practices, such as third-party tracking, could yield tens of billions of dollars in losses for the U.S. economy—and, importantly, not just in the advertising sector.²⁰ One recent study found that “[t]he U.S. open web’s independent publishers and companies reliant on open web tech would lose between \$32 and \$39 billion in annual revenue by 2025” if third-party tracking were to end “without mitigation.”²¹ That same study found that the lost revenue would become absorbed by “walled gardens,” or entrenched market players, thereby consolidating power and revenue in a small group of powerful entities.²² Smaller news and information publishers, multi-genre content publishers, and specialized research and user-generated content would lose more than an estimated \$15.5 billion in

¹⁴ For instance, in the early 2000s, private actions under California’s Unfair Competition Law (“UCL”) “launched an unending attack on businesses all over the state.” American Tort Reform Foundation, *State Consumer Protection Laws Unhinged: It’s Time to Restore Sanity to the Litigation* at 8 (2003), located [here](#). Consumers brought suits against homebuilders for abbreviating “APR” instead of spelling out “Annual Percentage Rate” in advertisements and sued travel agents for not posting their phone numbers on websites, in addition to initiating myriad other frivolous lawsuits. These lawsuits disproportionately impacted small businesses, ultimately resulting in citizens voting to pass Proposition 64 in 2004 to stem the abuse of the state’s broad private right of action under the UCL. *Id.*

¹⁵ Deighton & Kornfeld 2021 at 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 6.

¹⁹ Compare *id.* at 127 (Oct. 18, 2021) with John Deighton, Leora Kornfeld, and Marlon Gerra, *Economic Value of the Advertising-Supported Internet Ecosystem*, INTERACTIVE ADVERTISING BUREAU, 106 (2017), located [here](#) (finding that Internet employment contributed 94,808 full-time jobs to the Massachusetts workforce in 2016 and 217,220 jobs in 2020).

²⁰ See John Deighton, *The Socioeconomic Impact of Internet Tracking* 4 (Feb. 2020), located [here](#).

²¹ *Id.* at 34.

²² *Id.* at 15-16.

revenue.²³ According to one study, “[b]y the numbers, small advertisers dominate digital advertising, precisely because online advertising offers the opportunity for low cost outreach to potential customers.”²⁴ Absent cost-effective avenues for these smaller advertisers to reach the public, businesses focused on digital or online-only strategies would suffer immensely in a world where digital advertising is unnecessarily encumbered by overly-broad regulations.²⁵ Data-driven advertising has thus helped to stratify economic market power and foster competition, ensuring that smaller online publishers can remain competitive with large global technology companies.

B. Advertising Supports Massachusetts Residents’ Access to Online Services and Content

In addition to providing economic benefits, data-driven advertising subsidizes the vast and varied free and low-cost content publishers offer consumers through the Internet, including public health announcements, news, and cutting-edge information. Advertising revenue is an important source of funds for digital publishers,²⁶ and decreased advertising spends directly translate into lost profits for those outlets. Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²⁷ And, consumers tell us that. In fact, consumers valued the benefit they receive from digital advertising-subsidized online content at \$1,404 per year in 2020—a 17% increase from 2016.²⁸ Another study found that the free and low-cost goods and services consumers receive via the ad-supported Internet amount to approximately \$30,000 of value per year, measured in 2017 dollars.²⁹ Legislative frameworks that inhibit or restrict digital advertising can cripple news sites, blogs, online encyclopedias, and other vital information repositories, and these unintended consequences also translate into a new tax on consumers. The effects of such legislative frameworks ultimately harm consumers by reducing the availability of free or low-cost educational content that is available online.

C. Consumers Prefer Personalized Ads & Ad-Supported Digital Content and Media

Consumers, across income levels and geography, embrace the ad-supported Internet and use it to create value in all areas of life. Importantly, research demonstrates that consumers are generally not reluctant to participate online due to data-driven advertising and marketing practices. One study found more than half of consumers (53 percent) desire relevant ads, and a significant majority (86 percent) desire tailored discounts for online products and services.³⁰ Additionally, in a recent Zogby survey conducted by the Digital Advertising Alliance, 90 percent of consumers stated that free content was important to the overall value of the Internet and 85 percent surveyed stated they prefer the existing ad-supported model, where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.³¹

Unreasonable restraints on advertising create costs for consumers and thwart the economic model that supports free services and content online. For example, in the wake of the GDPR, and the

²³ *Id.* at 28.

²⁴ J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 9 (2022), located [here](#).

²⁵ *See id.* at 8.

²⁶ *See* Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located [here](#).

²⁷ *See* John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located [here](#).

²⁸ Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at \$1,400/Year; Annual Value Jumps More Than \$200 Since 2016* (Sept. 28, 2020), located [here](#).

²⁹ J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 2 (2022), located [here](#).

³⁰ Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), located [here](#).

³¹ Digital Advertising Alliance, *Zogby Analytics Public Opinion Survey on Value of the Ad-Supported Internet Summary Report* (May 2016), located [here](#).

opt-in consent requirements under that regime, platforms that have historically provided products and services for free have announced proposals to start charging consumers for access to their offerings.³² The bill would create a similar environment where many companies could be forced to charge for services and products that were once free to Massachusetts residents. Indeed, as the Federal Trade Commission noted in one of its submissions to the National Telecommunications and Information Administration, if a subscription-based model replaces the ad-based model of the Internet, many consumers likely will not be able to afford access to, or will be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.³³ A subscription model will diminish the number of channels available to access information, increase costs to consumers, curtail access to a diversity of online voices, and create an overall Internet environment where consumers with means can afford to access content, while consumers with less expendable income will be forced to go without access to online resources.

Laws that restrict access to information and economic growth can have lasting and damaging effects. The ability of consumers to provide, and companies to responsibly collect and use, consumer data has been an integral part of the dissemination of information and the fabric of our economy for decades. The collection and use of data are vital to our daily lives, as much of the content we consume over the Internet is powered by open flows of information that are supported by advertising. We therefore respectfully ask you to carefully consider MIPSAs potential impact on advertising, the consumers who reap the benefits of such advertising, and the overall economy before advancing it through the legislative process.

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³² See, e.g. Megan Cerullo, *Meta proposes charging monthly fee for ad-free Instagram and Facebook in Europe*, CBS NEWS (Oct. 3, 2023), located [here](#); see also Ismail Shakil, *Google to block news in Canada over law on paying publishers*, REUTERS (Jun. 29, 2023), located [here](#).

³³ Federal Trade Commission, *In re Developing the Administration's Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located [here](#).

We and our members support protecting consumer privacy. We believe, however, that MIPSAs would hinder legitimate business operations in Massachusetts, create new costs for consumers, and make Massachusetts a significant outlier in terms of data privacy requirements when compared to other states in the nation. We therefore respectfully ask you to decline to advance MIPSAs any further in the legislative process. Thank you in advance for consideration of this letter.

Sincerely,

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