



*Attorney-Client Communication
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[February 7, 2022]

Senator Kevin Thomas
Chairman of the New York Senate Committee on Consumer Protection
Legislative Office Bldg., Room 947
Albany, NY 12247

RE: Letter in Opposition to New York SB 6701

Dear Senator Thomas:

On behalf of the advertising industry, we oppose New York SB 6701, the “New York Privacy Act.”¹ We offer this letter to express our non-exhaustive list of concerns about this overly restrictive legislation as well as the potential harms it presents to consumers and the New York economy.

We and the companies we represent strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, state efforts to pass privacy laws only add to the increasingly complex privacy landscape for both consumers and businesses throughout the country. We and our members therefore support a national [preemptive] standard for data privacy at the federal level. If the State Assembly nonetheless decides to continue its effort to pass a privacy law in New York, we encourage it to consider an approach to privacy that aligns with recently enacted legislation in other states, such as the Virginia Consumer Data Protection Act (“VCDPA”).

Legislative proposals like SB 6701, which vary significantly from state privacy laws that are already in effect, could inadvertently harm New York consumers by depriving them of access to valuable online products and services that are advertising-supported and provided for free or at a low cost. Recent surveys suggest that the average consumer benefits from a \$1,403 per-year subsidy from ad-supported Internet services (including funding independent journalism, email, video, and a host of other services too numerous to mention), and consumers prefer this ad-supported model.² SB 6701’s overly-broad opt-in requirements, newly created duties of loyalty and care, and its inclusion of a private right of action would threaten innovation while creating a boon for the plaintiff’s bar without providing New Yorkers any real privacy protections.

To help ensure New York residents continue to benefit from legitimate data practices and continue to reap the benefits of a robust ad-supported online ecosystem, we recommend that the New York Senate undertake a study of the many practical and beneficial uses of data about consumers, as well as other jurisdictions’ approaches to privacy, before moving forward with enacting the overly broad restrictions and requirements set forth in SB 6701. As presently

¹ SB 6701 (hereinafter “SB 6701”), located [here](#).

² 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 at <https://digitaladvertisingalliance.org/press-release/americans-value-free-ad-supported-online-services-1400year-annual-value-jumps-more-200>.



written, SB 6701 falls short of creating a regulatory system that would work well for consumers or businesses.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, and New York continues to be one of the largest hubs for the advertising industry. These companies range from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies, is responsible for more than 85 percent of the U.S. advertising spend and drives more than 80 percent of our nation's digital advertising expenditures. We look forward to continuing to engage with you and the New York Senate Committee on Consumer Protection ("Committee") as it considers SB 6701.

I. New York Should Take Steps to Harmonize Its Approach to Privacy With Other State Laws

Harmonization in state privacy law standards is in the interests of consumers and businesses alike. Uniformity helps to ensure consumers are subject to similar privacy protections no matter where they live and businesses can take a more holistic approach to privacy law compliance. SB 6701 differs starkly from existing privacy laws, which would cause significant confusion for businesses and consumers alike. New York should not adopt a privacy legal regime that differs from and competes with existing laws when alternative approaches exist that protect consumers while offering consistency across states. We encourage the State Assembly to examine already-enacted consumer protection standards that are available for regulating data privacy, including the VCDPA, before moving forward with SB 6701.

In the absence of a preemptive federal data privacy law, it is critical for legislators to seriously consider the costs to both consumers and businesses that will accrue from a patchwork of differing privacy standards across the states. Harmonization with existing privacy laws is essential for minimizing costs of compliance and fostering similar consumer privacy rights. 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.³ 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.⁴ 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 small businesses shouldering a significant portion of the compliance cost burden.⁵ New York should not add to this compliance bill for

³ 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.

⁴ 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>.

⁵ 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).

businesses, and should instead opt for an approach to data privacy that is in harmony with already existing state privacy laws.

II. SB 6701's Approach to Data Privacy Is Overly Restrictive and is Out of Step With Other Laws Across the Country

While the proposals within SB 6701 seek to provide consumers with meaningful privacy protections, the bill fails to do so in a reasonable manner. Below we discuss three key areas where the bill fails to strike the appropriate balance between protecting consumers and allowing businesses to continue to serve their customers in a responsible way. Specifically, we discuss: (A) the overly broad opt-in requirement; (B) the creation of novel duties for companies without adequate guidance for compliance; and (C) the harmful inclusion of a private right of action.

A. The Bill's Opt-In Requirement is Overly Restrictive and Would Limit Consumer Benefits and Choices

SB 6701 would unreasonably require businesses to obtain “opt in consent from a consumer” in order to engage in almost all data processing activity.⁶ This would be a drastic alteration in how consumers interact with the businesses they frequent on a day-to-day basis, leading to consent fatigue. Consumers will be inundated with constant requests for their consent to carry out the most routine, essential, and expected data processing activities. When presented with so many requests for consent, consumers will either reflexively provide consent to get the service they want or deny all requests and become frustrated when their requests to use a service are limited due to a lack of consent.

SB 6701's binary approach to opt-in and opt-out rights should be refined to provide consumers with true protections that will allow them to continue to engage in the routine and essential day-to-day activity without interruption. Part of this reconsideration include a review for whether state-by-state efforts in this inter-state issue really do further New York's interests as a cradle of responsible advertising. New York should be at the forefront of championing federal legislation to ensure a healthy ecosystem for its many advertising-dependent companies and uniform responsible practices for New Yorkers. At the very least, this would also allow time and study for aligning New York's proposal with the opt-out approach in existing state laws after it considers the results those laws deliver.

B. The Creation of New Duties of Care and Loyalty for Data are Untested and Too Ambiguous to Offer Real Protection

SB 6701 would impose a duty of loyalty and care on businesses, duties that no other enacted privacy law creates and very few proposed laws have even contemplated.⁷ As drafted, it is unclear what these new duties would require of companies. For example, the duty of loyalty would require businesses to consider when it is [“reasonably foreseeable to the controller that a process presents a heightened risk of harm to the consumer or a class of consumers” and notify the consumer about that potential harm before obtaining consent to the processing activity.⁸] Such considerations are

⁶ SB 6701 at § 1102(2).

⁷ SB 6701 at §§ 1103(b-c).

⁸ SB 6701 at § 1103(b)(i).

extremely individualized, and each business (and each consumer) may reach a different conclusion in relation to similar processing activities. Additionally, when coupled with SB 6701's private right of action (discussed below), these duties would subject well-meaning companies that made good faith determinations based on what little guidance the law provides to frivolous lawsuits, leading to massive compliance and litigation costs that would not create any countervailing consumer benefits.

When creating new duties for businesses, lawmakers should ensure that all of the potential consequences are considered and weighed against what it will provide to consumers in terms of protection. Given the novelty of SB 6701's proposed duties of care and loyalty and the potentially significant impact these duties could have on New York businesses and the economy, the Committee should allot sufficient time to perform a full analysis of the proposals and to consider existing state legislation that may provide a better model for privacy regulation. It is important for businesses to be good stewards of data and use it responsibly, but companies should have clear guidance and rules of the road to help them achieve that aim, guidance that a reformulated proposal could provide through further study and evaluation.

C. A Private Right of Action is an Inappropriate Form of Enforcement

As presently drafted, SB 6701 allows for private litigants to bring lawsuits.⁹ We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the New York Attorney General ("AG"), because such an enforcement structure would lead to strong outcomes for New Yorkers 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 SB 6701 will create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions will flood New York's courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm. 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 expensive lawsuit may force smaller companies to agree to settle claims against them, even if they are convinced they are without merit.

⁹ SB 6701 at § 1106(6).

Beyond the staggering cost to New York 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.

III. Data-Driven Advertising Provides Significant Benefits to New York Residents, to the Economy, and to All Consumers

Over the past several decades, data-driven advertising has created a platform for innovation and tremendous growth opportunities. A new study found that the Internet economy's contribution to the United States' gross domestic product ("GDP") grew 22 percent per year since 2016, in a national economy that grows between two to three percent per year.¹⁰ 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.¹¹ Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet, 7 million more than four years ago.¹² More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.¹³ The same study found that the ad-supported Internet supported 431,723 full-time jobs across New York, almost double the number of Internet-driven jobs in the state from 2016.¹⁴

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.¹⁵ 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."¹⁶ 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.¹⁷ Smaller news and information publishers, multi-genre content publishers, and specialized research and user-generated

¹⁰ See John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 5 (Oct. 18, 2021), located https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ Compare *id.* at 130-31 (Oct. 18, 2021), located [here](#) 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 243,003 full-time jobs to the New York workforce in 2016 and 431,723 jobs in 2020).

¹⁵ See John Deighton, *The Socioeconomic Impact of Internet Tracking* 4 (Feb. 2020), located at <https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf>.

¹⁶ *Id.* at 34.

¹⁷ *Id.* at 15-16.

content would lose more than an estimated \$15.5 billion in revenue¹⁸. Data-driven advertising has thus helped to stratify economic market power, ensuring that smaller online publishers can remain competitive with large global technology companies.

B. Advertising Supports New Yorkers' 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 about COVID-19. Advertising revenue is an important source of funds for digital publishers,¹⁹ and decreased advertising spends directly translate into lost profits for those outlets. Since the coronavirus pandemic began, 62 percent of advertising sellers have seen advertising rates decline.²⁰ Publishers have been impacted 14 percent more by such reductions than others in the industry.²¹ Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²² Legislative models that inhibit or restrict digital advertising can cripple news sites, blogs, online encyclopedias, and other vital information repositories, thereby compounding the detrimental impacts to the economy presented by COVID-19. The effects of such legislative models 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.²³ 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.²⁴ Indeed, as the Federal Trade Commission noted in its recent comments to the National Telecommunications and Information Administration, if a subscription-based model replaced the ad-based model, many consumers likely

¹⁸ *Id.* at 28.

¹⁹ See Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

²⁰ IAB, *Covid's Impact on Ad Pricing* (May 28, 2020), located at https://www.iab.com/wp-content/uploads/2020/05/IAB_Sell-Side_Ad_Revenue_2_CPMs_5.28.2020.pdf

²¹ *Id.*

²² See John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located at <https://www.ipc.be/~media/documents/public/markets/the-value-of-data-consequences-for-insight-innovation-and-efficiency-in-the-us-economy.pdf>.

²³ Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), located at https://www.thompsoncoburn.com/docs/default-source/Blog-documents/consumer-attitudes-toward-relevant-online-behavioral-advertising-crucial-evidence-in-the-data-privacy-debates.pdf?sfvrsn=86d44cea_0.

²⁴ Digital Advertising Alliance, *Zogby Analytics Public Opinion Survey on Value of the Ad-Supported Internet Summary Report* (May 2016), located at https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/ZogbyAnalyticsConsumerValueStudy2016.pdf.



would not be able to afford access to, or would be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.²⁵

During challenging societal and economic times such as those we are currently experiencing, 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 any future legislation's 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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We and our members support protecting consumer privacy. We believe SB 6701 takes an overly restrictive approach to the collection, use, and disclosure of data about consumers that will unnecessarily impede New York residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider the bill and instead study its potential impacts, both positive and negative, so that New York and New Yorkers can benefit from the Senate's careful consideration of other approaches to data privacy. We would also very much welcome the opportunity to further engage with you and State Assembly leaders about our industry self-regulatory efforts that are continually seeking to enhance privacy protections around the collection and use of data about consumers.

Thank you in advance for consideration of this letter.

Sincerely,

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²⁵ Federal Trade Commission, *In re Developing the Administration's Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.