



February 18, 2021

The Honorable Rep. Edward Gordon
Chairman of the New Hampshire
House Judiciary Committee
PO Box 112
Bristol, NH 03222-0112

The Honorable Rep. Mark McLean
Vice Chairman of the New Hampshire
House Judiciary Committee
43 Forest Hill Way
Manchester, NH 03109-5145

The Honorable Rep. Kurt Wuelper
Clerk of the New Hampshire
House Judiciary Committee
1336 Parker Mountain Road
Strafford, NH 03884-6334

RE: Letter in Opposition to New Hampshire HB 384

Dear Rep. Gordon, Rep. McLean, and Rep. Wuelper:

On behalf of the advertising industry, we oppose New Hampshire HB 384,¹ and we offer these detailed comments summarizing our concerns about this overly restrictive legislation.

We and the companies we represent strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, legislative proposals like HB 384, that flatly prohibit legitimate transfers of specific data types, do not benefit consumers and instead stand to harm the businesses that support the economy. If enacted, HB 384 would take an approach to location data not seen in other privacy related laws or initiatives. The bill would also inadvertently harm New Hampshire consumers by depriving them of choices and 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.² In addition, the bill includes a private right of action, which would serve to threaten innovation while creating a windfall for the plaintiff's bar without providing any real protection for consumers from privacy harms.

To help ensure New Hampshire residents can continue to benefit from legitimate location data transfers and can continue to reap the benefits of a robust ad-supported online ecosystem, we recommend that the General Court undertake a study of the many practical and beneficial uses of consumer location data, as well as other jurisdictions' approaches to location data transfers before moving forward with enacting the overly broad restrictions set forth in HB 384. As presently written, HB 384 falls short of creating a regulatory system that will work well for consumers or businesses.

¹ HB 384 (N.H. 2021) (hereinafter "HB 384"), 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>.

As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, including many in New Hampshire. 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 the New Hampshire House Judiciary Committee (“Committee”) as it considers HB 384.

I. HB 384’s Approach to Location Data Is Severe and Fails to Acknowledge Existing Protections for Such Data in the Marketplace

A. The Bill is Overly Restrictive and Would Limit Consumer Benefits and Choices

HB 384 would unreasonably prohibit any sharing of location data to the detriment of consumers and businesses, with few exceptions.³ Although the bill includes the defined term “Authorized use” that seems to suggest sharing of location data in certain instances is permissible, the defined term is neither used in the substantive provisions of the bill, nor does it provide a sufficient allowance for legitimate uses of location data that may not be tied exclusively to the purpose of providing a service explicitly requested by a consumer.⁴

HB 384’s approach to location data transfers is more extreme than any other state privacy law that has been enacted to date. For example, the California Consumer Privacy Act of 2018 does not ban transfers of location data; instead, it enables California consumers to opt out of sales of such information.⁵ The California Privacy Rights Act of 2020 takes a similar approach by enabling Californians to limit the use and disclosure of precise geolocation information upon their request.⁶ Even the General Data Protection Regulation, Europe’s omnibus privacy regulation, does not flatly ban transfers of generalized location data like HB 384 would, if enacted. The drafters of HB 384 should review their approach and more appropriately balance the privacy needs of consumers with the regime that they propose to put in place, which is overly broad.

B. The Bill’s Prohibition Conflicts With Consumer Expectations and Deprives Consumers of the Benefits of the Data Economy

HB 384 makes broad assumptions about what consumers want and expect from digital services, without fully taking into consideration that these vary among consumers—in general it strips consumers of choices about whether they prefer ad-supported digital products and services, or whether they would prefer to pay for them. Indeed, some customers do not have the means to pay subscription fees and would prefer these products be subsidized by data-driven advertising. It is important for legislative leaders to recognize that industry-level independent accountability already exists and has already acted many times in this area to bring companies into compliance with location standards.⁷ By acknowledging existing privacy systems in place, HB 384’s drafters can focus resources on areas not covered elsewhere.

³ *Id.* at Sec. 1(II)(a).

⁴ *Id.* at Sec. 1(I)(a).

⁵ California Consumer Privacy Act of 2018, Cal. Civ. Code § 1798.120.

⁶ California Privacy Rights Act of 2020, Sec. 10, § 1798.121.

⁷ Better Business Bureau, *DAAP Decisions and Guidance*, located at <https://bbbprograms.org/programs/all-programs/daap/DecisionsAndGuidance>.

Consumers have long been provided the opportunity to provide permission to location collection, use, and sharing for advertising. The major mobile platforms require consumer consent for the collection, use, and transfer of location data, effectively enabling consumers to control this on their own, and at the device or application level. Consumers have thus become accustomed to being able to exercise a choice to enable uses of location data that will benefit them and can be controlled by them. Sharing location data allows consumers to receive relevant advertisements at the right time and in the right place, and as discussed in more detail in Section III below, subsidizes the vast and varied content, products, and services they can access online.

HB 384 would take consumers' ability to exercise choice away from them, as well as all of the consumer benefits associated with location data transfers. One such benefit is the use of aggregate location data to combat the spread of COVID-19. HB 384 would restrict this beneficial, and privacy-protective use of location data by making a decision for consumers to prohibit all transfers of such data. The bill's blanket prohibition of virtually all location data transfers would therefore severely limit what consumers can experience online, regardless of their varying desires and expectations, and these critically important uses.

II. HB 384 Should Not Include a Private Right of Action

HB 384 states that “[a]ny customer whose location data has been shared in violation of this chapter may bring a private action in a court of competent jurisdiction.”⁸ We strongly believe that the responsibility for enforcing violations of privacy laws should be vested in the state alone, and HB 384 should not permit individuals to bring private lawsuits for violations. Including a private right of action in HB 384 would not adequately protect consumers from privacy harms and could have acutely detrimental effects on innovation and the state's economy.

Incorporating a private right of action in HB 384 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood New Hampshire'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, including a private right of action in HB 384 would 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. A private right of action would expose covered entities to extraordinary and potentially enterprise-threatening costs for technical violations of law rather than drive systemic and helpful changes to business practices. It would also encumber covered entities' attempts to innovate by threatening them 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.

Beyond the staggering cost to New Hampshire businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based

⁸ HB 384, Sec. 1(V).

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 reconsider the private right of action in HB 384. Enforcement responsibility for privacy-related legal violations should be with the state Attorney General alone. This approach would lead to strong outcomes for consumers while better enabling entities covered by the bill to allocate funds to developing processes, procedures, and plans to facilitate compliance with the new data privacy requirements.

III. The Data-Driven and Ad-Supported Online Ecosystem Benefits Consumers and Fuels Economic Growth

Throughout the past three decades, the U.S. economy has been fueled by the free flow of data—including location data. One driving force in this ecosystem has been data-driven advertising. Advertising has helped power the growth of the Internet for years by delivering innovative tools and services for consumers and businesses to connect and communicate. Data-driven advertising supports and subsidizes the content and services consumers expect and rely on, including video, news, music, and more. Data-driven advertising allows consumers to access these resources at little or no cost to them, and it has created an environment where small publishers and start-up companies can enter the marketplace to compete against the Internet's largest players.

Transfers of data over the Internet enable modern digital advertising, which subsidizes and supports the broader economy and helps to expose consumers to products, services, and offerings they want to receive. Digital advertising enables online publishers to offer content, news, services and more to consumers for free or at a low cost. In a September 2020 survey conducted by the Digital Advertising Alliance, 93 percent of consumers stated that free content was important to the overall value of the Internet and more than 80 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.⁹

As a result of this advertising-based model, U.S. businesses of all sizes have been able to grow online and deliver widespread consumer and economic benefits. According to a March 2017 study entitled *Economic Value of the Advertising-Supported Internet Ecosystem*, which was conducted for the IAB by Harvard Business School Professor John Deighton, in 2016 the U.S. ad-supported Internet created 10.4 million jobs.¹⁰ Calculating against those figures, the interactive marketing industry contributed \$1.121 trillion to the U.S. economy in 2016, doubling the 2012 figure and accounting for 6% of U.S. gross domestic product.¹¹

Consumers, across income levels and geography, embrace the ad-supported Internet and use it to create value in all areas of life, whether through e-commerce, education, free access to valuable content, or the ability to create their own platforms to reach millions of other Internet users. Consumers are increasingly aware that the data collected about their interactions on the web, in mobile applications, and in-store are used to create an enhanced and tailored experience.

⁹ Digital Advertising Alliance, *SurveyMonkey Survey: Consumer Value of Ad Supported Services – 2020 Update* (Sept. 28, 2020), located at https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/Consumer-Value-Ad-Supported-Services-2020Update.pdf.

¹⁰ John Deighton, *Economic Value of the Advertising-Supported Internet Ecosystem* (2017), located at <https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-2017-FINAL2.pdf>.

¹¹ *Id.*

Importantly, research demonstrates that consumers are generally not reluctant to participate online due to data-driven advertising and marketing practices. Indeed, as the Federal Trade Commission noted in its comments to the National Telecommunications and Information Administration, if a subscription-based model replaced the ad-based model, many consumers likely 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.¹² It is in this spirit—preserving the ad supported digital and offline media marketplace while helping to design appropriate privacy safeguards—that we provide these comments.

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We and our members support protecting consumer privacy. We believe HB 384 takes an overly restrictive approach to location data transfers that will unnecessarily impede New Hampshire residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider the bill and instead convert it to a study so New Hampshire citizens can benefit from the General Court’s careful consideration of other approaches to location data transfers. We would also very much welcome the opportunity to further engage with Committee leaders and the bill sponsors about our industry self-regulation efforts that are continually seeking to enhance privacy protections around the collection and use of consumer location data.

Thank you in advance for consideration of this letter.

Sincerely,

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¹² 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.