



December 8, 2021

The Honorable Senator Chris Rothfuss
Co-Chairman of the 2021 Select Committee on Blockchain, Financial Technology, and Digital
Innovation Technology
P.O. Box 1791
Laramie, WY 82073

The Honorable Representative Jared Olsen
Co-Chairman of the 2021 Select Committee on Blockchain, Financial Technology, and Digital
Innovation Technology
P.O. Box 4333
Cheyenne, WY 82003

RE: Comments from Advertising Industry in Opposition to Wyoming Data Privacy Act

Dear Chairman Rothfuss and Chairman Olsen:

On behalf of the advertising industry, we write to express our opposition to the Wyoming Data Privacy Act, 22LSO-0146 Working Draft 0.6 (“WDPA”). We provide this letter to explain some of our concerns about provisions in the bill draft that are inconsistent with existing state privacy laws, as well as to alert the legislature to the potential harms these proposed terms present to consumers and the Wyoming economy. Specifically, we provide the following comments:

- A Private Right of Action Would Be an Ineffective Form of Enforcement for Consumer Rights;
- Wyoming Should Align Its Privacy Legislation Approach with Existing State Laws;
- Broad Regulatory Authority Increases the Possibility For Divergent State Privacy Standards;
- Broad Opt In Consent Requirements Impede Consumers from Receiving Critical, Relevant Information and Messages; and
- Data-Driven Advertising Provides Significant Benefits to Wyoming Residents, to the Economy, and to All Consumers.

Our organizations collectively represent thousands of companies, from small businesses to household brands, advertising agencies, and technology providers, including a significant number of Wyoming businesses. Our combined membership includes more than 2,500 companies and is responsible for more than 85 percent of U.S. advertising spend. Through robust self-regulatory bodies and strong industry-imposed standards, our members engage in responsible data collection and use that benefits consumers and the economy, and we believe consumers deserve consistent and enforceable privacy protections in the marketplace. It is our primary objective to promote enactment of national, preemptive data privacy legislation consistent with the Privacy for America

Framework.¹ 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 in state privacy standards is in the best interests of consumers and businesses alike.

For the reasons provided below, we ask the Wyoming legislature to decline to advance the WDPAs as currently drafted through the legislative process in 2022. If the legislature does proceed with the WDPAs, however, we ask it to consider the following non-exhaustive list of issues inherent in the bill and take steps to amend the draft so it better aligns with existing state privacy laws.

I. A Private Right of Action Would Be an Ineffective Form of Enforcement for Consumer Rights

We strongly believe private rights of action should have no place in privacy legislation. The WDPAs' broad private right of action would make Wyoming an outlier in comparison to California, Virginia, Colorado, and Nevada, all of which provide for exclusive state enforcement in their privacy laws for violations of consumer rights. Instead, enforcement responsibility should be vested in the Wyoming Attorney General ("AG") alone. Such an enforcement structure would lead to strong outcomes for Wyoming residents while better enabling businesses to allocate resources to developing processes, procedures, and plans to facilitate compliance with new data privacy rules. An AG enforcement structure, coupled with a reasonable cure period, would help to keep businesses who have tried in good faith to comply with new privacy requirements out of the courts, thereby preserving judicial resources and minimizing litigation costs. AG enforcement is in the best interests of consumers and businesses alike.

A. A Private Right of Action Would Not Provide Meaningful Redress to Wyoming Residents

A private right of action would create a complex and flawed compliance system without tangible privacy benefits for Wyoming residents. Allowing private actions would flood the state's courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations of the law rather than focusing on actual consumer harm. A study of 3,121 private actions under the Telephone Consumer Protection Act ("TCPA") occurring over a 17-month timespan after the Federal Communications Commission issued a ruling that opened the floodgates of TCPA litigation showed that approximately 60 percent of TCPA lawsuits were brought by just forty-four law firms.² Private actions thus create an environment that enriches a select few attorneys while providing only nominal benefits for consumers with viable claims. Moreover, the same TCPA study found that private rights of action tend to attract repeat plaintiffs. Plaintiffs looking to take advantage of private action regimes strain judicial resources and exact penalties from businesses for technical violations of law that may not equate to any quantifiable harms on consumers.

¹ See Privacy for America, *Principles for Privacy Legislation*, located [here](#).

² U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* 2, 4, 11-15 (Aug. 2017), located at https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf; see also *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961 (2015).

Even entirely meritorious private claims against companies for legal violations that impact multiple consumers rarely result in material compensation to individuals as redress. Class action settlement amounts, for example, are usually underwhelming from the individual consumer’s perspective. To make the point: under a truth-in-advertising labeling legal regime that allowed a private right of action in a lawsuit targeting a well-known food manufacturing company, lawyers pocketed millions—an amount equal to \$2,100 per hour they spent on the case.³ Their clients, on the other hand, took home a mere \$15 per consumer at most—a fraction of the amount their attorneys received.⁴ The result is similar in TCPA litigation, as individuals often walk away with a minimal portion of a settlement fund that pays out to class members pro rata, while 25 to 30 percent of that fund goes directly to class counsel.⁵ Amounts paid out to consumers have proven to be insignificant, even though only 4 to 8 percent of eligible claim members make themselves available for compensation from settlement funds.⁶ Private rights of action therefore unjustly enrich attorneys without offering proportionate, tangible benefits or meaningful recompense to consumers.

B. A Private Right of Action Would Have a Chilling Effect on Wyoming Businesses

Additionally, a private right of action would have a chilling effect on Wyoming’s economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of the law. Private rights of action can drive companies to settle cases to avoid excessive litigations costs despite plausible arguments they may have to support their defense. A recent study estimated that a Florida privacy bill, which included a private right of action, would have generated more than 80 class-action lawsuits initially, incurring more than \$4.2 billion in litigation costs.⁷ The study anticipated those litigation costs would increase over time. Small, startup, and mid-size firms are particularly vulnerable to the threat of litigation and premature settlements. One notable example is a suit brought against a consumer’s local dry cleaner for \$54 million, claiming that the store did not abide by its “Satisfaction Guaranteed” promise when it failed to return a man’s pants. After a hard-fought, three-year legal battle, the dry cleaner went out of business due to expenses associated with defending the suit. Outcomes such as these provide little benefit to consumers on the whole, threaten the viability of honest, well-meaning businesses, and do not support the development of consistent, enforceable standards.

Beyond the staggering cost to Wyoming businesses that a private right of action would create, 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. As a result, including a private right of action in privacy legislation would make Wyoming unfriendly to consumers and businesses alike. We therefore ask legislators keep private rights of action out of privacy legislation and instead favor a framework that makes enforcement responsibility the purview of the AG alone.

³ American Tort Reform Foundation, *State Consumer Protection Laws Unhinged: It’s Time to Restore Sanity to the Litigation* 4 (2003), located at http://www.atra.org/wp-content/uploads/2016/12/WP_2013_Final_Ver0115.pdf. (hereinafter, “ATR Report”).

⁴ *Id.*

⁵ U.S. Chamber Institute for Legal Reform, *Ill-Suited: Private Rights of Action and Privacy Claims* 7-8 (Jul. 2019), located at https://www.instituteforlegalreform.com/uploads/sites/1/Ill-Suited_-_Private_Rights_of_Action_and_Privacy_Claims_Report.pdf.

⁶ *Id.*

⁷ See Florida Tax Watch at 2, 19.

II. Wyoming Should Align Its Privacy Legislation Approach with Existing State Laws

We share the Wyoming legislature’s interest in advancing meaningful privacy standards so consumers have consistent privacy rights and businesses are able to take a more holistic approach to privacy law compliance. However, the WDPA differs from every other state privacy law that has been enacted to date. For example, the WDPA’s inclusion of the concept of “personal digital identity” represents an entirely new approach to data privacy. This term exists in virtually no other state’s omnibus privacy law and would add confusion to an already convoluted set of requirements businesses must follow to comply with other state law privacy standards.

Instead of adopting the WDPA as currently drafted, we encourage the legislature to align its approach with recently enacted privacy laws in other states, such as the VCDPA.⁸ Harmonization with existing privacy laws is critical to minimizing costs of compliance and fostering similar consumer privacy rights. Moreover, compliance costs associated with divergent privacy laws are significant. By way of example, a regulatory impact assessment of California’s Consumer Privacy Act of 2018 concluded that the initial compliance costs to California firms would be \$55 billion.⁹ 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.¹⁰ Wyoming 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.

III. Broad Regulatory Authority Increases the Possibility For Divergent State Privacy Standards

As currently written, the WDPA would provide the AG with broad regulatory authority to “promulgate any rules necessary to implement [the] act.”¹¹ Providing a broad regulatory directive in this fashion would not support the development of a uniform approach to data privacy laws, but rather runs contrary to that goal. Under the current draft of the bill, Wyoming would have the potential to diverge even more dramatically from privacy laws in other states, as the AG would have the ability promulgate regulations interpreting the bill in ways that differ from privacy standards in other states. This would deprive consumers of consistent data privacy rights and protections, and it would deny companies the regulatory consistency to enable effective compliance across the country. We therefore encourage the Wyoming legislature to remove the bill’s broad regulatory authority to better ensure consistency among state standards for data privacy.

⁸ See Virginia Consumer Data Protection Act, §§ Va. Code Ann. 59.1-571 et seq., located [here](#).

⁹ 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.

¹⁰ 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://floridatxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986>.

¹¹ WDPA, Sec. 3.

IV. Broad Opt-in Consent Requirements Impede Consumers from Receiving Critical, Relevant Information and Messages

As discussed in more detail in Section V below, the data-driven and ad-supported online ecosystem benefits consumers and fuels economic growth and competition. Companies, nonprofits, and government agencies alike use data to varying groups of individuals with specific, relevant messages. Targeted messaging provides immense public benefit by reaching individual consumers with information that is relevant to them in the right time and place. Legal requirements that limit entities' ability to use demographic data responsibly to reach consumers with important and pertinent messaging, such as those set forth in the WDPA, can have unintended consequences and, ultimately, serve as a detriment to consumers' health and welfare.¹²

The same ad-technology systems and processes that enable public health messaging also enable retailers to reach consumers, allow timely wildfire warnings to reach local communities, and facilitate the dissemination of missing children alerts, among myriad other beneficial uses.¹³ In accordance with responsible data use, uses of data for targeted advertising should be subject to notice requirements and effective user controls. Legal requirements should focus on prohibiting discriminatory uses of such data and other uses that could endanger the health or welfare of consumers instead of placing blanket opt-in consent requirements on uses of data. One-size-fits-all opt-in requirements for data uses run the risk of regulating out of existence beneficial uses of information that help consumers, businesses, and non-profits by making messaging and information more relevant to them. Opt-in consent requirements also tend to work to the advantage of large, entrenched market players at the expense of smaller businesses and start-up companies. To ensure uses of demographic data to benefit Wyoming residents can persist, and to help maintain a competitive business marketplace, we suggest that the Committee considers limiting any opt-in requirement to apply to demographic data only in cases where processing results in decisions that produce legal effects concerning a consumer or similarly significant effects concerning a consumer.

V. Data-Driven Advertising Provides Significant Benefits to Wyoming Residents, to the Economy, and to All Consumers

Over the past twenty years, 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

¹² For example, broad opt-in requirements for demographic data could undermine public health efforts to ensure information about the pandemic and vaccines are accessible to all Wyoming residents. Businesses' ability to process key demographic data enables them to identify at-risk groups and reach out to these communities with crucial information about the coronavirus as well as information regarding who can receive vaccines at particular locations and particular times. Targeted messaging sent to various communities based on demographic characteristics have worked to encourage members of hard to reach communities to receive COVID-19 vaccinations. See Jeremy B. Merrill and Drew Harwell, *Telling conservatives it's a shot to 'restore our freedoms': How online ads are promoting coronavirus vaccination*, WASHINGTON POST (Aug. 24, 2021), located [here](#).

¹³ See, e.g., Digital Advertising Alliance, *Summit Snapshot: Data 4 Good – The Ad Council, Federation for Internet Alerts Deploy Data for Vital Public Safety Initiatives* (Sept. 1, 2021), located [here](#); 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](#); Digital Advertising Alliance, *Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth \$1200/Year, 85 Percent Prefer Ad-Supported Internet to Paid* (May 11, 2016), located [here](#); Digital Advertising Alliance, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), located [here](#).

national economy that grows between two to three percent per year.¹⁴ 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.¹⁵ Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet, 7 million more than four years ago.¹⁶ More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.¹⁷ The same study found that the ad-supported Internet supported 7,325 full-time jobs across Wyoming, up over 40 percent in comparison to Internet-driven employment in 2016.¹⁸

A. Advertising Fuels Economic Growth

Data-driven advertising supports a competitive online marketplace and contributes to tremendous economic growth. Overly restrictive that legislation significantly hinders certain advertising practices, such as third-party tracking, could yield tens of billions of dollars in losses for the U.S. economy.¹⁹ 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.”²⁰ That same study found that the lost revenue would become absorbed by “walled gardens,” entrenched market players, thereby consolidating power and revenue in a small group of powerful entities.²¹ 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 revenue.²² 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 Wyoming 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. Advertising revenue is an important source of funds for digital publishers,²³ and decreased advertising spends directly translate into lost profits for those outlets. Since the pandemic began, 62 percent of advertising sellers have seen advertising rates decline.²⁴ Publishers have been impacted 14 percent

¹⁴ 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.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 6.

¹⁸ Compare *id.* at 136 (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 4,306 full-time jobs to the Wyoming workforce in 2016 and 7,325 jobs in 2020).

¹⁹ 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>.

²⁰ *Id.* at 34.

²¹ *Id.* at 15-16.

²² *Id.* at 28.

²³ See Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

²⁴ 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

more by such reductions than others in the industry.²⁵ Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²⁶ 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. 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.²⁷ 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.²⁸ 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 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.²⁹

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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²⁵ *Id.*

²⁶ 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>.

²⁷ 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.

²⁸ 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.

²⁹ 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.

We and our members support protecting consumer privacy. However, we believe the privacy legislation under consideration takes approach to the collection, use, and disclosure of data about consumers that is out of step with other states. This approach will unnecessarily impede Wyoming residents from receiving helpful services and accessing useful information online, while also creating compliance challenges for businesses facing a myriad of significantly different legislative requirements across several states. We therefore respectfully ask you to decline to advance the WDPA through the legislative process.

Sincerely,

Dan Jaffe
Group EVP, Government Relations
Association of National Advertisers
202-269-2359

Alison Pepper
Executive Vice President, Government Relations
American Association of Advertising Agencies, 4A's
202-355-4564

Christopher Oswald
SVP, Government Relations
Association of National Advertisers
202-269-2359

David Cohen
Chief Executive Officer
Interactive Advertising Bureau

David LeDuc
Vice President, Public Policy
Network Advertising Initiative
703-220-5943

Clark Rector
Executive VP-Government Affairs
American Advertising Federation
202-898-0089

CC: Mike Signorelli, Venable LLP
Allie Monticollo, Venable LLP