



April 24, 2023

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

RE: New York S365 – Oppose

Dear Senator Thomas:

On behalf of the advertising industry, we oppose New York S365, 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, many of whom do substantial business in New York, strongly believe consumers deserve meaningful privacy protections supported by reasonable government and responsible industry policies. However, New York S365 represents an approach to privacy that is entirely novel and disharmonized with every other state that has passed privacy legislation to date. 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 standard for data privacy at the federal level. If the New York legislature nonetheless decides to continue its effort to pass a privacy law in the state, we encourage it to consider an approach to privacy that aligns with recently enacted legislation in other states.

Legislative proposals like S365, which vary significantly from other state privacy laws which are already in effect, could inadvertently harm New Yorkers by depriving them of access to valuable online products and services that are advertising-supported and provided for free or at a low cost. One recent study suggests that the average consumer benefits from a \$30,000 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 S365’s overly-broad opt-in requirements, untested and confusing duties of loyalty and care, and its inclusion of a private right of action would threaten innovation without providing New Yorkers with commensurate privacy protections.

Before moving forward with enacting the overly broad restrictions and requirements set forth in S365, and to help ensure New York residents can continue to benefit from legitimate data practices, we recommend that the New York Senate undertake a study of the many practical and beneficial uses of data about consumers that exist today, as well as other jurisdictions’ approaches to consumer data privacy protection. As presently written, S365

¹ New York S365 (hereinafter “S365”), located [here](#).

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

falls short of creating a regulatory system that would work well for both consumers and businesses.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country; moreover, New York, including the famous Madison Ave, continues to be one of the largest hubs for the advertising industry. The companies we represent range from small businesses to household brands, 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 2020.³ We would welcome the opportunity to engage with you further on our suggested amendments to S365 outlined here. We look forward to continuing to engage with you and the New York Senate Committee on Consumer Protection ("Committee") as it considers S365.

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 that businesses can take a more holistic approach to privacy law compliance. S365 differs starkly from existing privacy laws, which would cause significant confusion for businesses and consumers. New York should not adopt a law that differs from and competes with existing laws when alternative approaches exist that protect consumers while offering consistency across states. We encourage the legislature to examine already-enacted consumer protection standards that are available for regulating data privacy before moving forward with S365.

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.⁴ 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.⁵ 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

³ John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 124-125 (Oct. 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").

⁴ 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.

⁵ 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>.

shouldering a significant portion of the compliance cost burden.⁶ New York 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. S365's Approach to Data Privacy is Overly Restrictive and is Out of Step With Other Laws Across the Country

While the proposals within S365 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 creation of novel and untested duties for companies; (B) the overly broad opt-in requirement; and (C) the harmful inclusion of a private right of action.

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

S365 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 extremely individualized, and each business (and each consumer) may reach a different conclusion in relation to similar processing activities. Additionally, when coupled with S365'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 privacy benefits but would instead instill real incentives for companies not to innovate for fear of “gotcha” lawsuits.

When creating new duties for businesses, lawmakers should ensure that all of the potential consequences are considered and weighed against what such duties will provide to consumers in terms of protection. Given the novelty of S365'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 which a reformulated legislative proposal could provide through further study and evaluation.

⁶ 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).

⁷ S365 at §§ 1103(b-c).

⁸ *Id.* at § 1103(b)(i).

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

S365 would unreasonably require businesses to obtain “opt-in consent from a consumer” in order to process sensitive data.⁹ As discussed in more detail in Section III 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 send varying groups of individuals specific, relevant messages. Tailored 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 S365’s sensitive data opt-in consent requirements, can have unintended consequences and, ultimately, serve as a detriment to consumers’ health and welfare.

Ad-technology systems and processes enable everything from public health messaging to retailer messaging. They allow timely wildfire warnings to reach local communities and facilitate the dissemination of missing children alerts, among a myriad of other beneficial uses with the very same technology and techniques used for tailored advertising.¹⁰ In accordance with responsible data use, uses of data for tailored advertising should be subject to notice requirements and effective user controls. Instead of placing blanket opt-in consent requirements on responsible uses of data, any new legal requirements should focus on prohibiting discriminatory uses of such data and other uses that could endanger the health or welfare of consumers.

A one-size-fits-all opt-in requirement for data use runs the risk of regulating out of existence messaging and information which is more relevant to individuals and helpful to businesses, governments, and non-profits. 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 data to benefit New York residents can persist, and to help maintain a competitive business marketplace, we encourage you to remove the broad opt-in consent requirement for “sensitive data” processing. We suggest that you replace it with a requirement for opt-in consent only when such data will be used in furtherance of decisions that produce legal or similarly significant effects concerning a consumer. Such an approach would not only help to maintain competitive balance, but also reduce the risk of notice fatigue which some other laws have created as an unintended consequence.¹¹

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

As presently drafted, S365 allows 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 New York Attorney General (“AG”), because such an enforcement structure would lead to stronger outcomes for New Yorkers while better enabling businesses to allocate resources to developing processes, procedures, and plans to facilitate compliance with

⁹ *Id.* at § 1102(3)(a)(i).

¹⁰ See 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 at <https://digitaladvertisingalliance.org/blog/summit-snapshot-data-4-good-%E2%80%93-ad-council-federation-internet-alerts-deploy-data-vital-public>.

¹¹ Kate Fazzini, *Europe’s sweeping privacy rule was supposed to change the internet, but so far it’s mostly created frustration for users, companies, and regulators*, CNBC (May 5, 2019), located at <https://www.cnbc.com/2019/05/04/gdpr-has-frustrated-users-and-regulators.html>.

¹² S365 at § 1106(6).

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 S365 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.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 expensive lawsuit may force smaller companies to agree to settle claims against them, even if they are convinced they are without merit¹⁴.

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 recent 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.¹⁵ In 2020 alone, it contributed \$2.45 trillion to the U.S.'s \$21.18 trillion GDP, which marks an

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](#).

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 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.

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, 7 million more than four years ago.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 431,723 full-time jobs across New York, almost double the number of Internet-driven jobs in the state 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 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 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. 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

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 6.

¹⁹ 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).

²⁰ 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>.

²¹ *Id.* at 34.

²² *Id.* at 15-16.

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 at https://www.researchgate.net/profile/Howard-Beales/publication/265266107_The_Value_of_Behavioral_Targeting/links/599ecccc6fdcc500355d5af/The-Value-of-Behavioral-Targeting.pdf.

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 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.³²

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.

²⁷ 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>.

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](https://www.daa.org/press-releases/2020/09/28/americans-value-free-ad-supported-online-services-at-1400-year-annual-value-jumps-more-than-200-since-2016).

²⁹ J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 2 (2022), located [here](https://www.ftc.gov/system/files/documents/advocacy_documents/beales-stivers-an-information-economy-without-data-2022.pdf).

³⁰ 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.

³¹ 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.

³² 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. We believe S365 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 legislative 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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