



May 20, 2021

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 and we offer this letter to express our 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, legislative proposals like SB 6701 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.

Important matters like consumer privacy should be provided the informed, meaningful, and careful debate and consideration that a full legislative process provides. Such a process is impossible given the limited time left in New York’s legislative session. **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 how other jurisdictions’ approaches to such data take shape, before moving forward with enacting the overly broad restrictions and requirements set forth in SB 6701.** As presently written, SB 6701 falls short of creating a regulatory system that would work well for consumers or businesses. Holding the bill and reassessing its provisions in a new session would help New Yorkers reap the benefits of experience, and it would avoid unintended negative consequences for consumers and 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

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>.



forward to continuing to engage with you and the New York Senate Committee on Consumer Protection (“Committee”) as it considers SB 6701.

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

While the proposals within SB 6701 seek to provide consumers with meaningful privacy protections, it fails to do so in a reasonable manner. Below we discuss four 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.³ 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 in 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.⁴ 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 will be against a consumer’s physical, financial, psychological, or reputational interests” and notify the consumer about that potential harm before obtaining consent to the processing activity.⁵ This new duty would require each covered business to assess when data processing would against a particular consumer’s psychological or reputations interests. Such considerations are extremely individualized, and each business (and each consumer) may reach a different conclusion. Additionally, when

³ SB 6701 at § 1102(2).

⁴ SB 6701 at §§ 1103(a-b).

⁵ SB 6701 at § 1103(a)(i).



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, rather than seeking to quickly advance this legislation in the very small legislative window before the end of the session. 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.⁶ 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.

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

⁶ SB 6701 at § 1106.



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.

II. The Data-Driven and Ad-Supported Online Ecosystem Benefits Consumers and Fuels Economic Growth in New York

One driving force in the digital and Internet 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.

The collection, use, processing, and transfer of data over the Internet enables modern digital advertising, which subsidizes and supports the broader economy and helps consumers discover products, services, and offerings they want to receive. In a recent survey, 80% of consumers said they had found ads useful in finding new products, researching a purchase, or assisting with the shopping process.⁷

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.⁸

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.⁹ 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.¹⁰ In New York specifically, the industry added \$85 billion to the state GDP and created 10.4 million jobs in the state.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.

⁷ 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 at <https://digitaladvertisingalliance.org/press-release/zogby-poll>.

⁸ 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.

⁹ 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>.

¹⁰ *Id.*

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, 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, one to preserve these benefits for all consumers, that we provide this letter and suggest that SB 6701 be reconsidered and studied further to avoid harming this vital part of New York's and New Yorkers' daily lives.

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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 in a manner that is not possible with so little time left in the legislative session. We would also very much welcome the opportunity to further engage with you and General 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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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.