



October 25, 2021

Senator Barry R. Finegold
24 Beacon St., Room 511-A
Boston, MA 02133

Rep. Linda Dean Campbell
24 Beacon St., Room 238
Boston, MA 02133

RE: Advertising Industry Comments on Committee Privacy Proposals

Dear Senator Finegold and Representative Campbell:

On behalf of the advertising industry, we oppose the privacy bills discussed during the October 13, 2021 Joint Committee on Advanced Information Technology, the Internet, and Cybersecurity hearing,¹ and we offer this letter to express our concerns about overly- restrictive provisions in the multiple legislative drafts, and the potential harms these terms present to consumers and the Massachusetts economy.

We and the companies we represent strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, legislative proposals like those considered during the October 13, 2021 hearing could inadvertently harm Massachusetts 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 Particularly concerning, the overly-broad opt-in requirements, coupled with a private right of action, would threaten innovation while creating a boon for the plaintiff's bar without providing Massachusetts residents any real privacy protections. As presently written, Massachusetts' privacy bills fall 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, from small businesses, to household brands, advertising agencies, and technology providers, including a significant number of Massachusetts businesses. Our combined membership includes more than 2,500 companies, is responsible for more than 85 percent of U.S. advertising spend, and drives more than 80 percent of our nation's digital advertising spend. Digital advertising contributes almost a quarter of a million jobs to the Massachusetts economy and approximately \$2.4 trillion to the United States' gross domestic product ("GDP").³ We look forward to continuing to engage with you and the legislature.

¹ Hearing, Joint Committee on Advanced Information Technology, the Internet, and Cybersecurity 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>.

³ See John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 5, 121-23 (Oct. 18, 2021), located [here](#).

I. The Bills' Approach to Data Privacy Conflicts With Other Laws Across the Country

While the legislative proposals seek to provide consumers with meaningful privacy protections, they fail to do so in a reasonable manner. We share the Massachusetts 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. We therefore encourage the legislature to adopt approaches to data privacy that align with recently enacted privacy legislation in other states, such as the Virginia Consumer Data Protection Act.⁴

The legislation's provisions are deeply out of step with other state privacy laws. Advancing uniformity across state privacy law requirements would not only create a more streamlined and less costly compliance environment for businesses, but it would also minimize consumer confusion about potentially varying privacy rights and protections in different states. Alignment across state privacy laws is in the best interest of consumers, the nation's policy on data privacy, and businesses alike. In the absence of a national data privacy standard set by Congress, we ask the Massachusetts legislature to work to ensure its privacy bills align with, or at the very least do not conflict with, data privacy laws in other US jurisdictions.

II. Broad Opt-In Requirements are Overly Restrictive and Would Limit Consumer Benefits and Choices

A number of the proposed bills would unreasonably require businesses to obtain opt in consent from an individual in order to engage in almost all data processing activity. 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.

Lawmakers in myriad of jurisdictions have, over time, come to realize that broad opt-in consent requirements serve neither consumers nor businesses. The United Kingdom, for instance, has considered reimagining its approach to data privacy post-Brexit so that its framework is not as reliant on data subject consent as the country's prior approach under the General Data Protection Regulation.⁵ Opt-in regimes create unnecessary barriers for consumers to authorize routine and basic data processing functions. Broad opt-in consent requirements also impede key efficiencies for businesses that result from the Internet economy, particularly for small and medium sized firms. We therefore urge the Massachusetts legislature to ensure that opt-in consent requirements in any Massachusetts privacy bill are appropriately refined and tailored to provide consumers with true protections that will allow them to continue to engage in routine and essential day-to-day activity without interruption.

⁴ See Virginia Consumer Data Protection Act, §§ Va. Code Ann. 59.1-571 et seq., located [here](#).

⁵ Alex Hern, *UK to overhaul privacy rules in post-Brexit departure from GDPR*, THE GUARDIAN (Aug. 26, 2021), located at <https://www.theguardian.com/technology/2021/aug/26/uk-to-overhaul-privacy-rules-in-post-brexit-departure-from-gdpr>.

III. 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. Instead, enforcement should be vested with the Massachusetts Attorney General (“AG”) alone, because such an enforcement structure would lead to strong outcomes for Massachusetts residents while better enabling businesses to allocate resources to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements. 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 Massachusetts Residents

A private right of action would create a complex and flawed compliance system without tangible privacy benefits for Massachusetts residents. Allowing private actions would flood the Commonwealth’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.⁶ 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.

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.⁷ Their clients, on the other hand, took home a mere \$15 per consumer at most—a fraction of the amount their attorneys received.⁸ 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

⁶ 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).

⁷ 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”).

⁸ *Id.*

of that fund goes directly to class counsel.⁹ 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.¹⁰ 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 Massachusetts Businesses

Additionally, a private right of action would have a chilling effect on Massachusetts' 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 estimates that a Florida privacy law including a private right of action would generate more than 80 class-action lawsuits initially, incurring more than \$4.2 billion in litigation costs.¹¹ The study anticipates 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 Massachusetts businesses 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 Massachusetts unfriendly to consumers and businesses alike. We therefore encourage 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.

IV. Data-Driven Advertising Provides Significant Benefits to Massachusetts 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' GDP grew 22 percent per year since 2016 in a national economy that grows between two to three percent per year.¹² In 2020 alone, the Internet economy contributed \$2.45 trillion to the U.S.'s \$21.18 trillion GDP, which marks an eightfold growth from the Internet's

⁹ 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.

¹⁰ *Id.*

¹¹ See Florida Tax Watch at 2, 19.

¹² See John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 5 (Oct. 18, 2021), located [here](#).

contribution to GDP in 2008 of \$300 billion.¹³ Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet, which amounts to 7 million more jobs than four years ago.¹⁴ More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.¹⁵ The same study found that the ad-supported Internet contributed 217,220 full-time jobs across the Commonwealth of Massachusetts, well more than double the number of Internet-driven jobs from 2016.¹⁶

A. Advertising Fuels Economic Growth

Data-driven advertising supports a competitive online marketplace and contributes to tremendous economic growth. Overly restrictive legislation significantly hindering certain advertising practices, such as third-party tracking, could yield tens of billions of dollars in losses for the U.S. economy.¹⁷ 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.”¹⁸ 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.¹⁹ 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.²⁰ Data-driven advertising has thus helped to stratify economic market power, ensuring that smaller online publishers can remain competitive with large corporations.

B. Advertising Supports Massachusetts 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, including public health announcements, news, and cutting-edge information about COVID-19. Advertising revenue is an important source of funds for digital publishers,²¹ 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.²² Publishers have been impacted 14 percent

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 6.

¹⁶ Compare John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 127-28 (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 94,808 full-time jobs to the Massachusetts workforce in 2016 and 217,220 jobs in 2020).

¹⁷ 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>.

¹⁸ *Id.* at 34.

¹⁹ *Id.* at 15-16.

²⁰ *Id.* at 28.

²¹ See Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

²² 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.²³ Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²⁴ 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.²⁵ 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.²⁶ 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.²⁷

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 of 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.

²³ *Id.*

²⁴ See John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located at <http://thedma.org/wp-content/uploads/Value-of-Data-Summary.pdf>

²⁵ 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.

²⁶ 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.

²⁷ 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 an overly-restrictive approach to the collection, use, and disclosure of data about consumers, and that this approach will unnecessarily impede Massachusetts residents from receiving helpful services and accessing useful information online, while also creating compliance challenges for businesses facing myriad significantly different approaches. We therefore respectfully ask you to consider amendments addressing the concerns highlighted in this letter before advancing the bills.

Thank you in advance for consideration of this letter.

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 Grimaldi
Executive Vice President, Public Policy
Interactive Advertising Bureau
202-800-0771

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: Senator Cynthia Stone Creem
Representative David M. Rogers
Representative Andres X. Vargas