

January 25, 2022

The Honorable Sen. Delores G. Kelley
Chair of the Maryland Senate Finance Committee
3 East Miller Senate Office Building
11 Bladen Street
Annapolis, MD 21401

The Honorable Sen. Brian J. Feldman
Vice Chair of the Maryland Senate Finance Committee
104 James Senate Office Building
11 Bladen Street
Annapolis, MD 21401

RE: Letter in Opposition to Maryland SB 11

Dear Senator Kelley and Senator Feldman:

On behalf of the advertising industry, we oppose the Maryland Online Consumer Protection and Child Safety Act (“SB 11”).¹ We and the companies we represent, many of whom do substantial business in Maryland, agree that Maryland consumers deserve meaningful privacy protections supported by reasonable government policies. However, we strongly believe privacy should be the subject of preemptive federal legislation,² because passing privacy laws on a state-by-state basis provides uneven protections for consumers and creates a complex landscape for businesses across the country.

If the General Assembly nonetheless decides to continue its effort to pass a privacy law in Maryland, we encourage it to consider adopting an approach to privacy that aligns with recently enacted law in other states, such as the Virginia Consumer Data Protection Act (“VCDPA”), to foster harmonization across state privacy standards.³ As presently written, SB 11 falls short of creating a regulatory system that will work well for Maryland consumers or business. We address the following non-exhaustive areas of concern with the bill in this letter:

- **Maryland Should Take Steps to Harmonize Its Approach to Privacy With Other State Laws**
- **SB 11’s Proposed Global Opt Out Provisions Lack Reasonable Safeguards to Protect Consumer Choice**
- **Privacy Laws Should Be Subject to Attorney General Enforcement and Should Not Permit a Private Right of Action**

¹ SB 11 (Md. 2022), located [here](#).

² See Privacy for America, *Principles for Privacy Legislation*, located [here](#).

³ See Virginia Consumer Data Protection Act, §§ Va. Code Ann. 59.1-571 et seq., located [here](#).

- **SB 11’s Disclosure Requirements Related to Third Parties Are Operationally Infeasible**
- **SB 11’s Blanket Ban On Disclosures of Data Associated With Individuals Under Age 16 Would Impede Teens’ Access to Online Resources**
- **The Data-Driven and Ad-Supported Online Ecosystem Benefits Maryland Consumers and Fuels Economic Growth**

As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. 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. Our group has more than a decade’s worth of hands-on experience it can bring to bear on matters related to consumer privacy and controls. We would welcome the opportunity to engage with you on further study of the proposal with an aim toward better aligning the wants of consumers with the needs of the Internet economy.

I. Maryland 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 across state requirements helps to ensure consumers are subject to similar privacy protections no matter where they live and businesses can take a more holistic approach to privacy law compliance. Maryland should not adopt an outdated, confusing, and burdensome privacy legal regime when alternative approaches exist that protect consumers while providing consistency across states. We encourage the General Assembly to examine more up-to-date consumer protection standards that are available for regulating data privacy, including the VCDPA, before moving forward with SB 11.

Efforts to emulate outdated privacy laws in Maryland will significantly and disproportionately impact the ability of small and mid-size businesses and start-up companies to operate successfully in the state. A standardized regulatory impact assessment of the California Consumer Privacy Act of 2018 (“CCPA”), for example, estimated *initial* compliance costs at 55 billion dollars.⁴ This amount did not account for ongoing compliance expenses and needed resource allotments outside of the costs to businesses to bring themselves into initial compliance with the law. Additionally, that same report estimated that businesses with less than 20 employees would need to spend \$50,000 each to begin their CCPA compliance journey, and businesses with less than 50 employees would need to spend approximately \$100,000 each.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 small businesses shouldering a significant portion of the compliance cost burden.⁶ Maryland should reconsider implementing outdated privacy law provisions and instead should work to harmonize SB 11 with the VCDPA.

⁴ California Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act Regulations* at 11 (August 2019), located at https://www.tellusventure.com/downloads/privacy/calif_doj_regulatory_impact_assessment_cpca_14aug2019.pdf.

⁵ *Id.*

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).

II. SB 11's Proposed Global Opt Out Provisions Lack Reasonable Safeguards to Protect Consumer Choice

SB 11 would require businesses to allow consumers to “exercise the right to opt out of the sale or disclosure of the consumer’s personal information through a technology indicating the consumer’s intent to opt out, including a preference or browser setting, browser extension, or global device setting.”⁷ Unfortunately, SB 11’s current provisions surrounding such controls are not accompanied by sufficient safeguards to ensure a preference indicated by a setting is a true expression of a consumer’s choice. We urge you to either amend this provision to provide adequate safeguards to ensure these controls do not unfairly disadvantage various market participants, or remove this provision from the bill for further consideration.

Such controls must be designed and implemented in a manner that ensures a preference expressed through the setting is enabled by a consumer, and does not unfairly disadvantage or advantage one business or model over another.⁸ Otherwise, these settings run the risk of intermediary interference, as the companies that stand between businesses and consumers, such as browsers and others, can set such controls by default without requiring an affirmative consumer action to initiate the control. SB 11 would accelerate the unintended consequence of creating a new class of gatekeepers, which would undercut competition in the market. Unconfigurable, global opt out setting mechanisms have already been introduced in the market, making decisions for consumers by default without requiring them to affirmatively turn on the mechanisms.⁹ These tools are not user-enabled, as they do not provide any assurance that consumers themselves are the ones making privacy choices. Consumers should be assured the ability to take an action to enable these settings, and such settings should be subject to specific parameters that ensure they do not unfairly advantage certain businesses at the expense of others. For these reasons, the global privacy control provisions should be removed from SB 11.

III. Privacy Laws Should Be Subject to Attorney General Enforcement and Should Not Permit a Private Right of Action

As presently drafted, SB 11 allows for private litigants to bring lawsuits by deeming violations of the bill to be unfair, abusive or deceptive trade practices within the meaning of the Maryland Consumer Protection Act.¹⁰ We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the Maryland Attorney General (“AG”), because such an enforcement structure would lead to stronger outcomes for Maryland consumers while better enabling businesses to allocate funds 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.

A private right of action in SB 11 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood Maryland’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

⁷ SB 11, Sec. 14-407(E)(1).

⁸ See, California Privacy Rights Act of 2020, Cal. Civ. Code § 1798.185(a)(19)(A); Colorado Privacy Act, Colo. Rev. Stat § 6-1-1313(2).

⁹ See Brave, *Global Privacy Control, a new Privacy Standard Proposal, now Available in Brave's Desktop and Android Testing Versions*, located [here](#) (“Importantly, Brave does not require users to change anything to start using the GPC to assert your privacy rights. For versions of Brave that have GPC implemented, the feature is on by default and unconfigurable.”)

¹⁰ SB. 11, Sec. 14-411(A)(1).

divorced from any connection to actual consumer harm and provide consumers little by way of protection from detrimental data practices.

Additionally, including a private right of action in SB 11 would have a chilling effect on the state's economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of law. Private litigant enforcement provisions and related potential penalties for violations represent an overly punitive scheme that would not effectively address consumer privacy concerns or deter undesired business conduct. A private right of action would expose businesses to extraordinary and potentially enterprise-threatening costs for technical violations of law rather than drive systemic and helpful changes to business practices. It would also encumber businesses' attempts to innovate by threatening companies with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies. And, in many cases, 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 Maryland 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.

IV. SB 11's Disclosure Requirements Related to Third Parties Are Operationally Infeasible

SB 11 would, upon a consumer's request, require a business that collects personal information to disclose to the consumer the "names" of all "third parties to which the business disclosed the consumer's personal information."¹¹ This requirement is operationally infeasible given the modern structure of the Internet, which enables seamless data transfers between businesses to the benefit of consumers. Businesses also may not be able to comply with such a requirement due to confidentiality provisions they may have in contracts with their business partners, which oftentimes help companies innovate together in ways they could not individually. From a consumer's perspective, SB 11's requirement to provide names of third parties would likely result in inordinately long disclosures. The length of such disclosures would likely diminish their effectiveness. The Maryland General Assembly should therefore take steps to align its disclosure requirements with other state privacy laws, such as the VCDPA, which require disclosure of the *categories* of third parties to whom personal information is disclosed and not the individual names of the third parties themselves.

V. SB 11's Blanket Ban On Disclosures of Data Associated With Individuals Under Age 16 Would Impede Teens' Access to Online Resources

Our organizations do not flatly oppose all forms of heightened protections for uses of data associated with teens. In fact, we are proponents of a national privacy framework that creates additional protections for these unique internet users.¹² However, SB 11 would take an extreme and onerous approach to establishing protections for transfers of data associated with individuals under age 16. Specifically, the bill would flatly prohibit a business from disclosing any personal information

¹¹ SB 11, Sec. 14-4404(A)(3).

¹² See Privacy for America, *Principles for Privacy Legislation*, located [here](#).

associated with an individual under age 16 to a third party if the business has actual knowledge or willfully disregards the fact that the consumer is under 16 years of age.¹³

In this regard, SB 11 is out of step with every other state that has passed privacy legislation as well as sectoral privacy laws at the federal level that provide for sharing of this data where there is consent.¹⁴ SB 11 provides no exceptions to its blanket ban on data transfers, even for consent. In addition, the bill could also prohibit a consumer under the age of 16 from sharing personal information via a business, such as through online collaboration tools where students interact and share information. The bill's ban on U-16 data transfers would severely limit Maryland teens' access to online services and vital information, as described in more detail in Section V below. If enacted, the bill's burdensome terms related to adolescents would likely lead to a chilling effect on teens' ability to access online resources at a time in their lives when they should enjoy wide access to the Internet to inform their education and development (everything from summer camp brochures to future school choices and myriad other opportunities which are part of American life). For these reasons, the provisions related to U-16 data transfers should be removed from SB 11.

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

Over the past several decades, 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 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 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 168,600 full-time jobs across Maryland, more than double the growth in Internet-driven employment 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.²⁰ One recent study found that "[t]he U.S. open web's independent publishers and

¹³ SB 11, Sec. 14-4407(B).

¹⁴ Children's Online Privacy Protection Act, 15 U.S.C. § 6502; California Privacy Rights Act of 2020, Cal. Civ. Code § 1798.120; California Consumer Privacy Act of 2018, Cal. Civ. Code § 1798.120; Virginia Consumer Data Protection Act, Va. Code Ann. §§ 59.1-572(D), 59.1-574(A)(5); Colorado Privacy Act, Colo. Rev. Stat § 6-1-1308(7).

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.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 6.

¹⁹ Compare *id.* at 127 (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 61,898 full-time jobs to the Maryland workforce in 2016 and 168,600 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>.

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 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 Maryland Consumers’ 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,²⁴ 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.²⁵ Publishers have been impacted 14 percent more by such reductions than others in the industry.²⁶ Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²⁷ 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.²⁸ 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

²¹ *Id.* at 34.

²² *Id.* at 15-16.

²³ *Id.* at 28.

²⁴ See Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

²⁵ 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

²⁶ *Id.*

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 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.

must pay for most content.²⁹ 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.³⁰

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 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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²⁹ 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.

³⁰ 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 SB 11 would impose new and particularly onerous requirements on entities doing business in the state and would unnecessarily impede Maryland residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider the bill.

Thank you in advance for consideration of this letter.

Sincerely,

Christopher Oswald
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

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

Lartease Tiffith
Executive Vice President for Public Policy
Interactive Advertising Bureau
212-380-4700

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

Lou Mastria, CIPP, CISSP
Executive Director
Digital Advertising Alliance
347-770-0322

CC:

The Honorable Sen. Susan C. Lee
223 James Street Senate Office Building
11 Bladen Street
Annapolis, MD 21401

Mike Signorelli, Venable LLP
Allie Monticollo, Venable LLP