



February 12, 2024

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Chair of the Maryland Senate
Finance Committee
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Senator Dawn Gile
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Delegate C. T. Wilson
Chair of the Maryland House
Economic Matters Committee
231 Taylor House Office Building
6 Bladen Street
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Delegate Sara Love
210 Lowe House Office Building
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Senator Katherine Klausmeier
Vice Chair of the Maryland Senate
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Senator Katie Fry Hester
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Delegate Brian M. Crosby
Vice Chair of the Maryland House
Economic Matters Committee
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Delegate Kriselda Valderrama
362 Lowe House Office Building
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RE: SB 541 and HB 567 – Maryland Online Data Privacy Act - Oppose

Dear Chair Beidle, Vice Chair Klausmeier, Senator Gile, Senator Hester, Chair Wilson, Vice Chair Crosby, Delegate Love, and Delegate Valderrama:

On behalf of the advertising industry, we write to **oppose SB 541 and HB 567**,¹ the Maryland Online Data Privacy Act (“MODPA”). We provide this letter to offer our non-exhaustive list of concerns about this legislation. As described in more detail below, the bills contain provisions that are out-of-step with privacy laws in other states and will only add to the increasingly complex privacy landscape for both businesses and consumers across the country. We ask you to harmonize MODPA with other state privacy laws by recognizing the privacy benefits of pseudonymous data, removing onerous consent requirements, and clarifying that the bills do not create a private right of action.

¹ Maryland SB 541 (Gen. Sess. 2024), located [here](#) and Maryland HB 567 (Gen. Sess. 2024), located [here](#) (hereinafter, collectively, “MODPA”).

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 that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product (“GDP”) in 2020.² By one estimate, over 160,000 jobs in Maryland are related to the ad-subsidized Internet.³ We would welcome the opportunity to engage with you further on the non-exhaustive list of issues with MODPA we outline here.

I. MODPA Should Be Harmonized with Existing State Privacy Laws

A patchwork of differing privacy standards across the states creates significant costs for businesses and consumers alike. Efforts to harmonize state privacy legislation with existing privacy laws are critical to minimizing costs of compliance and fostering similar privacy rights for consumers no matter where they live. One way MODPA significantly diverges from the vast majority of state privacy laws is by proposing a flat ban on all sales of sensitive data.⁴ No other state has imposed such a restrictive requirement; instead, other states permit sensitive data processing subject to an opt out or require consumer consent for such processing. A flat ban on the sale of sensitive data takes control out of the hands of consumers and prevents businesses from engaging in beneficial uses of sensitive data for which they would otherwise be able to obtain consumer consent in most other states.

Another way MODPA is out-of-step with existing state privacy laws is that it lacks a concept of pseudonymous data. Almost all state privacy laws recognize the privacy benefits of “pseudonymous data,” which is typically defined to include personal data that cannot be attributed to a specific natural person without the use of additional information. These other state laws exempt this data from consumer rights to access, delete, correct, and port personal data, provided that the pseudonymous data is maintained separately from information needed to identify a consumer and is subject to effective technical and organizational controls that prevent the business from accessing such identifying information. Absent an explicit exemption for pseudonymous data from consumer rights, companies could be forced to reidentify data or maintain it in identifiable form so that they can, for example, return this information when responding to a consumer access request. Requiring businesses to link pseudonymous data with identifiable information provides less privacy protections for consumers than a framework that permits and encourages companies to maintain data sets separately. We ask you to amend MODPA and harmonize it with the majority of other state privacy laws to exempt pseudonymous data from the consumer rights of access, correction, deletion, and portability.

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.⁵ Another recent study found that a consumer data privacy proposal in a different state considering privacy legislation would have

² John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located at https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf.

³ *Id.* at 127.

⁴ MODPA at § 14-4607(A)(3).

⁵ 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://dof.ca.gov/wp-content/uploads/sites/352/Forecasting/Economics/Documents/CCPA_Regulations-SRIA-DOF.pdf.

generated a direct initial compliance cost of \$6.2 billion to \$21 billion and ongoing annual compliance costs of \$4.6 billion to \$12.7 billion for the state.⁶ 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 shouldering a significant portion of the compliance cost burden.⁷ Harmonization with existing privacy laws is essential to create an environment where consumers in Maryland have privacy protections that are consistent with those in other states, while minimizing unnecessary compliance costs for businesses. Maryland 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. A Consent Requirement for Content Personalization and Marketing Would Negatively Impact Maryland Residents and Hinder Economic Growth

MODPA would unreasonably require businesses to obtain consent from consumers before collecting data for the purpose of content personalization or marketing.⁸ No other state privacy law imposes an opt-in consent requirement for such marketing uses, and MODPA's restrictions on undefined terms could be read broadly to apply to even the most basic and routine processing activities, such as recommending new content based on a consumer's prior interactions with the business's digital properties or sending existing customers information about upcoming sales or product launches. Rather than providing consumers meaningful new privacy protections, an opt-in consent requirement like the one proposed would hinder Marylanders' ability to seamlessly engage online. If enacted, this requirement would exacerbate notice fatigue for Maryland consumers, who would be inundated with consent requests to collect data for routine, responsible uses as consumers navigate the Internet. Such a shift would virtually ensure Maryland residents have a vastly different online experience than consumers in neighboring or nearby states, such as Virginia, Delaware, and New Jersey, and would not receive the same opportunities to access resources available due to the ad-subsidized Internet as consumers from all other states. Maryland should not proceed with a blanket opt-in approach for marketing that starkly diverges from the approach in all other states that have enacted consumer data privacy legislation.

III. MODPA's Consent Requirements Should Be Amended to Reflect the Realities of the Online Ecosystem

Additionally, a consent approach ignores the realities of the online ecosystem. In general, third parties do not have a direct relationship with consumers, and therefore have no way to effectively obtain consent from consumers to collect personal data for personalization and marketing purposes. Therefore, MODPA's consent requirements could shut off the ability of third parties to participate in

⁶ 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>.

⁷ 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).

⁸ MODPA at § 14-4607(A)(1).

the data marketing ecosystem, undermining competition in the marketplace and lowering the availability of goods and services to consumers. Even states such as California have recognized other reasonable mechanisms for third parties to meet notice and choice requirements.⁹

Services provided by third parties help to create a more level economic playing field so small, mid-size, and start-up companies, many of which are minority and women-owned, can attract customers and compete in the marketplace with larger players. Third-party data sets are a key data asset that smaller entities utilize to reach and generate new audiences for their offerings. MODPA's consent requirement for content personalization and marketing would virtually ensure that the smallest of companies lose a vital resource for attracting and interacting with a customer base. In addition, MODPA would severely limit Maryland residents' exposure to new products and services from niche and small businesses that may interest them.

To avoid the unintended consequence of stopping third parties from participating in the market and the negative downstream consequences of that result for Maryland consumers, we urge the Committee to remove the consent requirement for content personalization and marketing, or, alternatively, to permit third parties to rely on contractual assurances with their data providers who have direct relationships with consumers to satisfy this requirement. This would involve a business that provides data to a third party representing, and the third party relying on those representations, that the consumer consented to collection for content personalization or marketing purposes at the time of collection. Such a clarification would allow the direct consumer touchpoint to satisfy the bill's consent requirements and allow competition and consumer benefits to continue to flow from third-party data use.

IV. A Private Right of Action Is an Inappropriate Form of Enforcement for Privacy Legislation

As presently drafted, MODPA allows a consumer to seek a remedy under another law and thus could be read to allow for private litigants to bring lawsuits.¹⁰ MODPA should be updated to clarify that it does not create a private right of action under any law. We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the Attorney General ("AG") alone, because such an enforcement structure would lead to stronger outcomes for Maryland residents 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 possibility of a private right of action in MODPA would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions will flood Maryland's courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm.¹¹ Private right of action provisions

⁹ Cal. Code Regs. tit. 11, § 7012(i).

¹⁰ MODPA at § 14-4613(B).

¹¹ 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,

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 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 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 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. 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.¹²

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, the possibility of 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 clarify that MODPA does not create a private right of action under any law and vests enforcement authority with the AG alone.

V. The Data-Driven and Ad-Supported Online Ecosystem Benefits Maryland Residents and Fuels Economic Growth

Over the past several decades, data-driven advertising has created a platform for innovation and significant growth opportunities. One recent 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.¹³ 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 contribution to GDP in 2008 of \$300 billion.¹⁴ Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet in 2020, 7 million more than four years prior.¹⁵ More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.¹⁶ The same study found that the ad-supported Internet supported 168,600 full-time jobs across Maryland, more than double the number of Internet-driven

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](#).

¹² 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.*

¹³ Deighton & Kornfeld 2021 at 5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 6.

jobs from 2016.¹⁷

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.¹⁸ 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.”¹⁹ 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.²⁰ 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.²¹ 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.”²² 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.²³ 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 Maryland 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. Advertising revenue is an important source of funds for digital publishers,²⁴ and decreased advertising spends directly translate into lost profits for those outlets. Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²⁵ 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 2016.²⁶ Another study found that the free and low-cost goods and services consumers receive via the ad-supported Internet amount to

¹⁷ Compare *id.* at 127 (Oct. 18, 2021) with John Deighton, Leora Kornfeld, and Marlon Gerra, *Economic Value of the Advertising-Supported Internet Ecosystem*, INTERACTIVE ADVERTISING BUREAU, 106 (2017), located <https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-2017-FINAL2.pdf> (finding that Internet employment contributed 61,898 full-time jobs to the Maryland workforce in 2016 and 168,600 jobs in 2020).

¹⁸ See John Deighton, *The Socioeconomic Impact of Internet Tracking* 4 (Feb. 2020), located [here](#).

¹⁹ *Id.* at 34.

²⁰ *Id.* at 15-16.

²¹ *Id.* at 28.

²² J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 9 (2022), located [here](#).

²³ See *id.* at 8.

²⁴ See Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located [here](#).

²⁵ See John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located [here](#).

²⁶ 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](#).

approximately \$30,000 of value per year, measured in 2017 dollars.²⁷ 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 and 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 must pay for most content.²⁹

Unreasonable restraints on advertising create costs for consumers and thwart the economic model that supports free services and content online. For example, in the wake of the GDPR, and the opt-in consent requirements under that regime, platforms that have historically provided products and services for free have announced proposals to start charging consumers for access to their offerings.³⁰ MODPA would create a similar environment where many companies could be forced to charge for services and products that were once free to Maryland residents. Indeed, as the Federal Trade Commission noted in one of its submissions to the National Telecommunications and Information Administration, if a subscription-based model replaces the ad-based model of the Internet, many consumers likely will not be able to afford access to, or will be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.³¹ A subscription model will diminish the number of channels available to access information, increase costs to consumers, curtail access to a diversity of online voices, and create an overall Internet environment where consumers with means can afford to access content, while consumers with less expendable income will be forced to go without access to online resources.

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

²⁷ J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 2 (2022), located [here](#).

²⁸ Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), located [here](#).

²⁹ Digital Advertising Alliance, *Zogby Analytics Public Opinion Survey on Value of the Ad-Supported Internet Summary Report* (May 2016), located [here](#).

³⁰ See, e.g. Megan Cerullo, *Meta proposes charging monthly fee for ad-free Instagram and Facebook in Europe*, CBS NEWS (Oct. 3, 2023), located [here](#); see also Ismail Shakil, *Google to block news in Canada over law on paying publishers*, REUTERS (Jun. 29, 2023), located [here](#).

³¹ Federal Trade Commission, *In re Developing the Administration's Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located [here](#).

therefore respectfully ask you to carefully consider MODPA'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.

* * *

We and our members strongly support meaningful privacy protections for consumers supported by reasonable and responsible industry practices and support a national standard for data privacy accordingly. We believe, however, that MODPA would impose particularly onerous requirements that would unreasonably restrict the free flow of information that powers the economy and Maryland residents' access to resources. We therefore respectfully ask you to reconsider MODPA and would welcome the opportunity to engage further and work with you to hone a workable privacy framework that benefits Maryland businesses and consumers alike.

Thank you in advance for your consideration of this letter.

Sincerely,

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