



April 26, 2021

The Honorable Senator Harold French
Chair of the New Hampshire
Senate Commerce Committee
State House, Room 107
107 North Main Street
Concord, NH 03301

The Honorable Senator William Gannon
Vice Chair of the New Hampshire
Senate Commerce Committee
State House, Room 124
107 North Main Street
Concord, NH 03301

RE: Letter in Opposition to New Hampshire HB 384

Dear Senator French and Senator Gannon:

On behalf of the advertising industry, we oppose New Hampshire HB 384,¹ and we offer these detailed comments summarizing our concerns about this overly restrictive legislation.

We and the companies we represent strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, legislative proposals like HB 384 could inadvertently harm New Hampshire 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, and consumers prefer this ad-supported model.² HB 384 is ambiguous as drafted, and it includes a private right of action, which would threaten innovation while creating a windfall for the plaintiff's bar without providing consumers any real privacy protections.

To help ensure New Hampshire residents continue to benefit from legitimate location data transfers and continue to reap the benefits of a robust ad-supported online ecosystem, we recommend that the General Court undertake a study of the many practical and beneficial uses of consumer location data, as well as other jurisdictions' approaches to location data transfers, before moving forward with enacting the overly broad restrictions set forth in HB 384. As presently written, HB 384 falls short of creating a regulatory system that will work well for consumers or businesses.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, including many in New Hampshire. 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 forward to continuing to engage with the New Hampshire Senate Commerce Committee ("Committee") as it considers HB 384.

¹ HB 384 (N.H. 2021) (hereinafter "HB 384"), 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>.

I. HB 384’s Approach to Location Data Is Severe and Fails to Acknowledge Existing Protections for Such Data in the Marketplace

A. The Bill is Overly Restrictive, Ambiguous, and Would Limit Consumer Benefits and Choices

HB 384 would unreasonably prohibit any sharing of location data, unless a consumer affirmatively waives this right, to the detriment of consumers and businesses.³ Although the bill includes the defined term “authorized use” that seems to suggest sharing of location data in certain instances is permissible, the defined term is neither used in the substantive provisions of the bill, nor does it provide a sufficient allowance for legitimate uses of location data that may actually benefit consumers, even if not tied exclusively to the purpose of providing a service explicitly requested by a consumer.⁴ For instance, uses of location data by mobile applications that enable tailored advertising help to keep mobile applications available to consumers for free or at a low cost.

HB 384’s definition of the term “location data” is so broad that it could include an extremely wide set of information, such as zip codes and other proxies for generalized geographical areas. The bill defines “location data” as “information related to the physical or geographical location of a person or the person’s mobile communications device, regardless of the particular technological method used to obtain this information.”⁵ Unlike more common definitions used in legislation and regulations, this definition is ambiguous and therefore it is overly broad, as it is not limited to latitude or longitude coordinates, GPS information, or even data pulled from a user’s device itself; instead, it could be read to apply to *any* information related to location at *any* level of precision that is acquired through *any* technological method.

This definition does not align with approaches to regulating location data in other state legislative models that more precisely define the data that is subject to legal requirements. For example, the Virginia Consumer Data Protection Act and the California Privacy Rights Act of 2020, regulate *precise* geolocation data, defined as information that can be used to locate a consumer with accuracy within a circle with a radius of 1,750 to 1,850 feet, respectively. HB 384 stands in stark contrast to these approaches by proposing to regulate a much wider swath of information, including information that is merely *related* to a consumer’s geographical location rather than data that can actually locate a consumer or device more precisely.

HB 384’s overly broad definition of “location data,” coupled with its private right of action, could significantly expose regulated entities to enforcement risks, thereby causing them to rethink the benefits of doing business in New Hampshire. For instance, if a New Hampshire consumer self-reports her location through a mobile app by entering in her zip code or entering “Concord” into a weather app, and the mobile app company shares such data for purposes other than fulfilling an explicit request of the consumer, such as to inform advertising, that sharing of the zip code or city without express consumer consent could be a violation of the bill. The bill could be read to permit the trial bar to initiate private actions in instances such as these, thereby creating significant legal risks for New Hampshire businesses. Should companies determine that the legal risks of doing business in New Hampshire as a result of HB 384 are too significant, they could decide to limit their operations in the state. Such a move would deprive New Hampshire consumers of access to myriad

³ *Id.* at Sec. 1(II)(a).

⁴ *Id.* at Sec. 1(I)(a).

⁵ *Id.* at Sec. 1(I)(c).

free and low-cost online content, products, and services, and could minimize their ability to benefit from the ad-supported Internet.

B. The Bill's Limitation on Location Data Sharing Conflicts with Consumer Expectations and Existing Protections in the Marketplace

It is important for legislative leaders to recognize that industry-level independent accountability regarding location data transfers already exists and has already acted many times in this area to bring companies into compliance with location standards.⁶ By acknowledging existing privacy systems in place, the Committee and the New Hampshire General Court can focus resources on areas not covered elsewhere.

Consumers have long been provided the opportunity to provide permission to location collection, use, and sharing for advertising. The major mobile platforms require consumer consent for the collection, use, and transfer of location data, effectively enabling consumers to control this on their own, and at the device and application level. Consumers have thus become accustomed to being able to exercise a choice to enable uses of location data that will benefit them and can be controlled by them. Sharing location data allows consumers to receive relevant advertisements at the right time and in the right place, and as discussed in more detail in Section III below, subsidizes the vast and varied content, products, and services they can access online.

Additionally, industry-level codes of conduct, backed by strong accountability mechanisms, already exist and have been adding to existing requirements, including recently introduced requirements for apps to provide more detailed disclosures about the uses of consumer data.⁷ Our organizations have been leaders in self-regulation for years, promoting largely the same goals and requirements that would be established by HB 384. We are proud of our role to establish critical privacy protections for consumers around the use of location data, and we have been relied on many times to bring companies into compliance with existing standards.⁸ We welcome the opportunity to discuss these efforts with the Committee and New Hampshire General Court, and to help identify how legislation could promote consistent practices and definitions from these existing frameworks.

II. HB 384 Should Not Include a Private Right of Action

HB 384 states that “[a]ny customer whose location data has been shared in violation of this chapter may bring a private action in a court of competent jurisdiction.”⁹ We strongly believe that the responsibility for enforcing violations of privacy laws should be vested in the state alone, and HB 384 should not permit individuals to bring private lawsuits for violations. Including a private right of action in HB 384 would not adequately protect consumers from privacy harms and could have acutely detrimental effects on innovation and the state’s economy.

⁶ Better Business Bureau, *DAAP Decisions and Guidance*, located at <https://bbbprograms.org/programs/all-programs/daap/DecisionsAndGuidance>.

⁷ See NAI, *Guidance for NAI Members: Opt-In Consent* (Nov. 2019), located at https://www.networkadvertising.org/sites/default/files/final_nai_optinconsent-guidance19_final.pdf.

⁸ See Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising: Application of Self-Regulatory Principles to the Mobile Environment*, located at https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/DAA_Mobile_Guidance.pdf; see also Better Business Bureau, *DAAP Decisions and Guidance*, located at <https://bbbprograms.org/programs/all-programs/daap/DecisionsAndGuidance>.

⁹ HB 384, Sec. 1(V).

Incorporating a private right of action in HB 384 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood New Hampshire'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, including a private right of action in HB 384 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. A private right of action would expose covered entities 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 covered entities' attempts to innovate by threatening them 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 Hampshire 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 reconsider the private right of action in HB 384. Enforcement responsibility for privacy-related legal violations should be with the state Attorney General alone. This approach would lead to strong outcomes for consumers while better enabling entities covered by the bill to allocate funds to develop processes, procedures, and plans to facilitate compliance with the new data privacy requirements.

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

Throughout the past three decades, the U.S. economy has been fueled by the free flow of data—including location data. One driving force in this 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.

Transfers of data over the Internet enable modern digital advertising, which subsidizes and supports the broader economy and helps to expose consumers to products, services, and offerings they want to receive. 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.¹⁰

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.¹¹ 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.¹²

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. 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 in its 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.¹³ It is in this spirit—preserving the ad supported digital and offline media marketplace while helping to design appropriate privacy safeguards—that we provide these comments.

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¹⁰ 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.

¹¹ 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>.

¹² *Id.*

¹³ 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 HB 384 takes an overly restrictive approach to location data transfers that will unnecessarily impede New Hampshire residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider the bill and instead convert it to a study so New Hampshire citizens can benefit from the General Court's careful consideration of other approaches to location data transfers. We would also very much welcome the opportunity to further engage with Committee leaders and the bill sponsors about our industry self-regulation efforts that are continually seeking to enhance privacy protections around the collection and use of consumer location data.

Thank you in advance for consideration of this letter.

Sincerely,

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