



February 8, 2021

The Honorable Chairman of the House Industry, Business and Labor Committee
Representative George Keiser
422 Toronto Drive
Bismarck, ND 58503-0276

The Honorable Vice Chairman of the House Industry, Business and Labor Committee
Representative Mike Lefor
P.O. Box 564
Dickinson, ND 58602-0564

RE: North Dakota HB 1330

Dear Chairman Keiser and Vice Chairman Lefor:

On behalf of the digital advertising industry, we provide the following comments on North Dakota's HB 1330.¹ As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, 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 U.S. advertising spend, and drives more than 80 percent of our nation's digital advertising spend. We and the companies we represent strongly believe consumers deserve meaningful privacy protections.

We also believe in the importance of maintaining a thriving Internet and information-driven economy, where robust innovation drives strong economic growth, employing millions of Americans and providing transformative benefits for consumers. These objectives are not mutually exclusive. It is vital that consumer privacy legislation appropriately supports these key goals. North Dakota, along with the United States as a whole and the rest of the world, has borne witness to a historic economic downturn and a significant uptick in unemployment due in large part to the COVID-19 pandemic.² At a time when we all face some of the most challenging circumstances in recent history, legislation that threatens to increase financial strain on companies can have the unintended effect of forcing businesses to divert important resources away from maintaining employment levels in order to address sweeping new legal requirements. We encourage the North Dakota legislature to carefully consider the impacts privacy legislation could have on businesses and how such impacts may harm consumers if legislation is not reasonably tailored to work for both consumers and businesses in the state.

¹ HB 1330 (N.D. 2021), located at <https://www.legis.nd.gov/assembly/67-2021/documents/21-0816-02000.pdf>.

² See BISMARCK TRIBUNE, *Midwest economy improving but businesses less optimistic; North Dakota loses 33,000 nonfarm jobs* (Jan. 5, 2021), located at https://bismarcktribune.com/business/midwest-economy-improving-but-businesses-less-optimistic-north-dakota-loses-33-000-nonfarm-jobs/article_1f47b865-317d-5d66-8354-10f393e486fd.html; see also NORTH DAKOTA STATE UNIVERSITY, Center for the Study of Public Choice and Private Enterprise, *Economic Outlook*, located at https://www.ndsu.edu/centers/pcpe/research/economic_outlook/.

I. HB 1330 Should Not Adopt an Opt-In Consent Requirement

North Dakota should not adopt a one-size fits all consent requirement for the sale of protected data. No other state has taken this approach. Such an approach would create the most restrictive privacy law in the United States, thereby hindering legitimate business, particularly small businesses, and harming North Dakotan consumers. We recommend that the legislature initiate a study to examine various approaches to data privacy so that North Dakotans can benefit from a careful analysis of proposed privacy provisions as well as experiments in other jurisdictions.

If the House of Representatives elects to move forward now, it should eliminate the bill's opt-in consent requirement. HB 1330 states that “[a] covered entity may not sell a user’s protected data to another person unless the user opts-in to allow the sale.”³ The bill also requires a user to be “given the opportunity to opt-in to the sale of each type of protected data by individual selection.”⁴ Though the bill does not provide a definition of “sale,” the term “protected data” is defined broadly to include a user’s interests, shopping habits, and Internet browsing history, among a number of other data elements.⁵ Requiring opt-in consent for transfers of such information would unreasonably burden North Dakotans and would severely limit their ability to access important information and resources for free or at a low cost. We therefore encourage the legislature to revise HB 1330’s flat prohibition on sales of covered data absent opt-in consent by instead adopting a more nuanced approach to empowering consumers to control sales of protected data.

While we fully support consumers’ ability to control sales of protected data associated with them, requiring opt-in consent for such transfers could reduce North Dakotans’ ability to access important information and services online. In privacy proposals and laws across the United States, as well as the General Data Protection Regulation in Europe, opt-in consent requirements are reserved for the most sensitive data. However, HB 1330 would extend an opt-in consent requirement to a much broader swath of data elements, many of which have been found to not be sensitive, such as a user’s professional history, screen name, and purchase history. As described in further detail in Section III below, data transfers power the online economy and enrich consumers’ lives by providing them with free and low-cost access to crucial content, news, research, products, and services provided by businesses. The free flow of data is imperative for the Internet ecosystem to function, and consumers benefit greatly from this existing structure. Moreover, HB 1330’s requirement that consumers opt-in to the sale of *each type of protected data by individual selection* would place an enormous burden on North Dakotans to approve transfers of discrete data elements included in the protected data definition.

We strongly believe the legislature should amend HB 1330 to enable consumers to opt out of protected data sales rather than require them to opt in to such sales. This amendment would align HB 1330 with the prevailing approach taken in other state privacy laws as well as industry self-regulatory programs and codes of conduct, such as those administered by the Digital Advertising Alliance (“DAA”). Opt-in consent requirements hinder consumers’ ability to

³ HB 1330, Section 1, Prohibition against sale of protected data except with consent.

⁴ *Id.*

⁵ *Id.*

access vital online resources. We encourage the North Dakota legislature to revise HB 1330's prohibition on sales of protected data absent user consent by instead enabling consumers to opt out of personal data sales.

II. Enforcement for Violations of HB 1330 Should be Vested in the Attorney General Alone

As presently drafted, HB 1330 enables private citizens to bring actions against covered entities for violations of the bill.⁶ HB 1330 also expressly allows for class action lawsuits.⁷ We strongly believe that the responsibility for enforcing violations of privacy laws should be vested in the North Dakota Attorney General ("AG"), and HB 1330 should not include a private right of action or allow for class action lawsuits. We encourage the legislature to amend the bill's enforcement provisions so enforcement is within the purview of the Attorney General alone. This adjustment would lead to strong outcomes for consumers while better enabling covered entities to allocate funds to developing processes, procedures, and plans to facilitate compliance with the new data privacy requirements set forth in HB 1330.

If HB 1330 is enacted with a private right of action, North Dakota would be adopting the most aggressive privacy law enforcement approach in the United States. The private right of action in HB 1330 is more expansive in scope than any other state privacy law that has been enacted to date, including the California Consumer Privacy Act of 2018 ("CCPA").⁸

Incorporating a private right of action in HB 1330 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood North Dakota 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 1330 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 does 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.

Beyond the staggering cost to North Dakota 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

⁶ HB 1330, Section 1, Violation – Penalties, § 1.

⁷ HB 1330, Section 1, Violation – Penalties, § 2.

⁸ Compare HB 133, Section 1, Violation – Penalties with Cal. Civ. Code § 1798.150.

therefore encourage legislators to alter HB 1330's enforcement provisions and refrain from including a private right of action in the bill.

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. 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.

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

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. 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.¹¹ The survey also found that consumers value ad-supported content and services at \$1,403.88 a year, representing an increase of over \$200 in value since 2016.¹²

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 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

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 DAA, *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.

¹² *Id.*

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.

* * *

Thank you for your consideration of these comments. We look forward to working further with you on refining HB 1330.

Sincerely,

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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.