

April 27, 2011

The Honorable Alan Lowenthal
California State Senate
State Capitol, Room 2032
Sacramento, CA 95814

Subject: SB 761 (Lowenthal) — OPPOSITION.

Dear Senator Lowenthal:

The associations listed on this letter are writing to strongly oppose SB 761. California Senate Bill 761 would create an unnecessary, unenforceable and unconstitutional regulatory burden on Internet commerce. The bill covers an overly broad range of information, and would regulate indirectly virtually all businesses who collect, use or store information from a website. The measure would negatively effect consumers who have come to expect rich content and free services through the Internet, and would make them more vulnerable to security threats. It would prove costly to the state and cumbersome for the Attorney General to figure out how to regulate under the bill and to enforce the law.

California law already provides a number of significant privacy protections for consumers to protect their sensitive personal information, including social security number, video rental records, health records, and financial records. California law requires web sites to post a privacy policy so that consumers can determine what information is collected and how it is used with third parties. But unlike SB 761, these bills regulated only personal identifiable information. All of these laws also contain important exceptions and balances so that they are workable. SB 761 contains none of these limitations, and instead leaves the Attorney General's office the complex and delicate task of figuring out what to exempt.

It is unnecessary – Today, consumers can easily opt out of the collection of data through browser tools. The four leading Internet browsers - Internet Explorer, Safari, Firefox, and Google Chrome - all provide user-friendly filtering options that block the ability of companies to collect data or track Internet use. These include features that disable third party cookies and "in private" browsing features. Additionally, self-regulatory programs are already addressing all areas of consumer privacy that the bill attempts to legislate, specifically the use of online behavioral data for advertising purposes. The Network Advertising Initiative (www.networkadvertising.org) and the Digital Advertising Alliance (www.aboutads.info) provide easy-to-use mechanisms to opt out of interest-based advertising from more than 60 companies.

The DAA's cross-industry program is now promoting enhanced notice to consumers of these choices through a consumer-friendly icon placed on or near advertisements, an approach also being followed in Europe. The Federal Trade Commission and Department of Commerce have endorsed self-regulation in this area as the preferred policy approach -- and these programs in particular, which have broad industry support and which already provide consumers with enhanced transparency and choice far more rapidly than cumbersome rulemaking.

The bill would harm California's Internet economy and innovation -- California leads the world in Internet commerce; the sector employs an estimated 162,000 people, generates billions of dollars in revenue and is the fastest growing source of jobs in the state. SB 761 would create a second, conflicting set of standards to which companies would have to conform or else face class action lawsuits. This would, in turn, create significant confusion and uncertainty for investors, businesses and consumers. Online commerce would simply be unworkable if websites were forced to comply with a patchwork of privacy and notice laws. This would impose an unprecedented and arduous regulatory burden on Internet commerce. Further, a do not track requirement on the use of this data would stifle innovation and prevent companies from bringing new and useful products to market, including the new employees required to create and service those products. Features like automatic spell check, product recommendations, real time traffic mapping and search suggestions were developed using customer data in a safe and unintrusive way. Prohibiting the collection and use of this data would severely harm future innovation in the state and harm consumers.

It would be unworkable and unenforceable -- The April 25th version of the bill has become even more extreme, imposing a free-standing flat ban on any covered entity sharing or transferring any covered information, for any purpose at all. The provision is emblematic of why SB 761 should be rejected. This total ban against sharing any covered information is not subject to any exceptions through AG regulations and would apply "notwithstanding any other provision of law". The provision is blatantly unconstitutional under California law. It would stop California's information economy in its tracks. Even if it were amended to give the AG the authority to establish exceptions through regulations, the restriction would create enormous business uncertainty in California and put the fate of California's information economy in the hands of the Attorney General's office while the state is fighting a recession.

Even without this new provision, SB 761 bill would require any company that collects information through a website to provide a broad do not track bar against virtually any collection of information online (regardless of whether that information identifies the individual). What is more, the "do not track" requirement would apply to offline data collection as well, if the Attorney General's Office decides to do this. Exceptions for data collection that are essential to operate businesses, websites and other online services are optional, and the Attorney General's office is given minimal guidance regarding what sort of beneficial information collection to exempt.

Beneficial information collection that must be exempt, but is not under SB 761, would include providing a product to an individual who has requested it, basic business functions including accounting and internal auditing, protecting against theft, fraud and unauthorized transactions, and prevention of fraud or physical danger to individuals.

The failure to recognize these necessary business realities would chill investments in California's tech, health care and financial services sectors. The bill's do not track requirement would force good actors, who do not pose a threat to privacy, to collect more consumer data in order to know whom not to track. Similarly, if the Attorney General's office chose to exercise its authority to impose an "access" requirement, companies would ironically have to take information that they currently collect and use in non-individually identifying form and instead to collect and keep it in a usable form to be able to respond to individuals' request to provide data about that individual. Of course, bad actors would simply ignore the statute in the same way that they ignore current privacy, anti-phishing and SPAM laws. In the end this bill would not result in achieving its intended goals of a real improvement in transparency, privacy or safety.

It gratuitously singles out advertising companies for special regulation. The April 25th revision to the bill needlessly attacks the advertising and marketing industry. It states that the regulations under the bill do not apply to companies that obtain opt-in consent, unless a majority of their revenue comes from advertising or marketing. Opt-in consent is not a viable compliance route for most tracking models, but the blatant discrimination in this approach is pointless and inappropriate. California is a leader in the Internet advertising industry. California's Employment Development Department reported that as of April 15th, the State had an unemployment rate of a staggering 12%. Disrupting this industry's revenue streams directly affects its ability to create jobs. The State has a critical economic stake in the success of this industry both in terms of increased hiring in the State and improving the state tax base. It would be a sad irony if California moved in this direction given its reputation as the birthplace of the Internet.

It would have repercussions far beyond entities directly regulated by the bill – The bill would have sweeping, negative implications for security in a broad range of contexts, including health care, financial services, retail fraud and online safety.

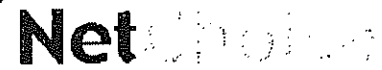
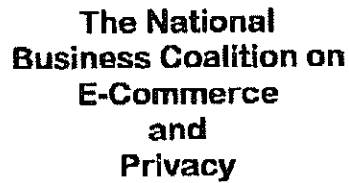
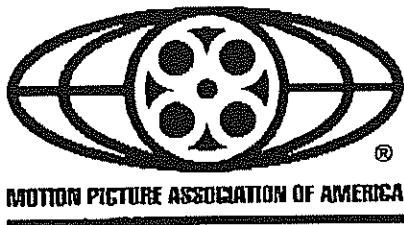
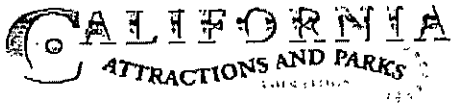
It would be costly to the state – This bill would require the Attorney General to write and implement regulations necessary for a balanced do not track regime, leaving a host of critical questions for the Attorney General to figure out. This is a herculean feat which Congress, the Federal Trade Commission and the U.S. Department of Commerce have been attempting for over four years. The resources necessary to complete this task will be daunting and any error will result in significant harm to California's technology and main street economy and to consumers. Further, to attempt to enforce the law, the state would need to hire a significant number of computer forensic experts and engineers. Lastly, the Attorney

General would need to set aside millions of dollars to defend the inevitable legal challenges to the law.

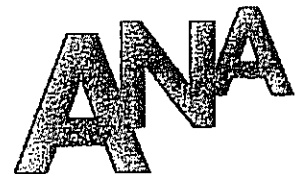
It is clearly unconstitutional – Internet commerce is an inherently interstate activity and SB 761 would regulate businesses far beyond California's borders. Websites cannot restrict who visits their sites and cannot reliably know if a visitor is a California resident. Therefore every Internet website in the world would need to change their practices in order to comply with the law or risk violating it and facing costly class action lawsuits. As a result, any out-of-state company affected by the law would be entitled to bring a Commerce Clause challenge under 42 U.S.C. §1983. As this is a U.S. Constitutional issue, once the law was declared unconstitutional, the plaintiffs would qualify for an award of attorneys' fees against the state under 42 U.S.C. §1988. Enactment of this legislation would result in California taxpayers paying both the plaintiffs' attorneys fees as well as the state's defense costs, wasting taxpayer dollars at a time when the State can least afford it.

This legislation fails to recognize the significant challenges in establishing a do not track regime. It ignores the costs to the State of California involved in simply attempting such an endeavor, and the severe economic harm it would impose on California's economy and job creation due to uncertainty of its vast restrictions on companies storing covered information. For all of these reasons, we oppose SB 761.





- Convenience
- Choice
- Commerce



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