

May 22nd, 2023

Senator Anne Carney, Senate Chair
Representative Matt Moonen, House Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, Maine 04333

RE: MSCC testimony on LD's 1705, 1902, 1973, – Privacy Legislation

Senator Carney, Representative Moonen, and members of the Judiciary Committee:

My name is Ben Lucas, I live in Portland, and I represent the Maine State Chamber of Commerce. The Chamber is the voice of Maine business, speaking for approximately 5,000 Maine businesses of all sizes throughout the State. The Maine State Chamber of Commerce is testifying in opposition to L.D. 1705, 1902, and we are in support of L.D. 1973.

First, the Chamber recognizes the critical importance of policy conversations around privacy. Our members work very hard to protect the privacy of their customers. Issues dealing with privacy stretch across all sectors of Maine's economy. The Chamber appreciates the committee holding these hearings, and we look forward to working with this committee, other business associations, consumer advocate group to examine potential approaches to protecting the privacy and security of consumers' personal information – and we remain committed to staying active in these conversations. One thing we want to be sure to stress to the committee is often policy conversations around privacy turn into a conversation about giant technology companies - but we want to committee to recognize this has an impact on every sector of our economy and every type of business in Maine – large and small.

We would respectfully ask the committee to consider carrying over this legislation until 2024. Policy conversations as it pertains to privacy are super complex and take a significant amount of time. Given that some of this legislation was just printed, we are towards the end of the legislative session, the workload of this committee and the full Legislature – Maine businesses and consumers would be better served if this legislation was carried over and allowed for work to continue over the summer and fall, and we can work this issue next year. We do believe that there needs to be one vehicle for privacy legislation, and we think L.D. 1973 is the best vehicle for that. There has been a lot of work done across the country on privacy – it has been done in a bipartisan manor, with support of both industry and consumers – and the Chamber believes L.D. 1973 mirrors what has been done in other states and is a more comprehensive approach.

As it relates to specifics of the legislation – regarding L.D. 1705 and L.D. 1902 we have serious concerns about these proposals. Efforts to regulate biometric information as proposed in both pieces of legislation have several problems. Last year, the legislature considered biometric privacy legislation, modeled on an Illinois approach that is 15 years old, has not been adopted in a single state, and that would create significant cybersecurity risks for consumers in Maine, paves the way for more litigation, and adds more burdensome regulations on our businesses. We believe this approach, reflected in LD 1705, should again be rejected. With L.D. 1902, which purports to cover “consumer health data,” but, would cover nearly all personal data. There has been significant concern over the broad scope of the bill means that truly sensitive data opt-in notifications will be overwhelmed by the notifications for innocuous data collection and use that consumers expect. In other words, its overbreadth overwhelms the intent of the statute – an intent that industry broadly supports.

Regarding L.D. 1973, we believe this is a good bill and seeks to address multiple aspects of privacy – not just one specific as proposed in the other legislation before you. One area we would like to see addressed is the conversation around “opt-in vs. opt-out”. L.D. 1973 proposes that everything must be an “opt-in” approach. We would prefer to see “opt-in” applied to only very sensitive information such as health, financial, etc. We are hopeful that can be resolved as this move through the legislative process. We believe this is the right approach to take for the following reasons:

1. A clear framework based on state privacy laws like those in Connecticut and Virginia has proliferated across the U.S. in recent years, with ten state legislatures having passed omnibus privacy legislation. None of those states require follows the opt-in only approach Maine is considering. Maine should not depart from the well-established national standard without carefully considering the impacts on Maine residents and businesses operating in the state.
2. Consumers enjoy and expect access to ad-supported content online and the free-flow of certain types of data is necessary to the proper functioning of the online ecosystem. Accordingly, when organizations rely on “consent” to collect and use personal data, the type of consent (opt in or opt out) required should depend on the context of the relationship between the organization and consumer, taking into account the nature of the data and its proposed uses.
3. Consistency between state laws reduces compliance costs and avoids unnecessary consumer confusion brought about by differing rights and responsibilities that vary from state to state. Having a different privacy policy for each of the growing number of states that have adopted privacy laws will promote consumer confusion about how their data is being used and what their rights to that data are.
4. The focus of modern privacy laws is typically aimed at giving the strongest protections to consumers' most sensitive data—race, ethnicity, religion, medical conditions, etc.—and enable them to prevent it from being sold to unaffiliated third parties without their knowledge. The U.S. Federal Trade Commission has long recognized that the online ecosystem requires the free flow of personal data and that consumers expect that their personal data will be used and disclosed for certain purposes (such as first-party marketing) and that such uses and disclosures for such purposes should not require opt-in consent.
5. Compliance costs of opt-in privacy regimes are much higher and impact smaller controllers much more than larger ones. In the data-driven online ecosystem that means small businesses are less able to compete with large companies that can comply with burdensome laws more easily.

6. Privacy laws' impact is not limited to only large controllers collecting large amounts of consumer data. Small businesses disproportionately rely on the ability to cost-effectively target ads to potential local customers through large online platforms. Opt-in consent requirements will mean fewer consumers will allow their data to be used in ways that they already expect it will be used under an opt-out regime. Broad opt-in requirements under this bill would significantly raise those businesses' advertising costs and potentially jeopardize the viability of many small businesses. This impact would be especially acute for local service and tourism businesses that have few alternative means to reach potential customers.

I have attached to my testimony some additional information. We urge the committee to support L.D. 1973 and use it as the vehicle for privacy legislation moving forward. Thank you for the opportunity to testify, I am happy to bring back additional information.

Sincerely,
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