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Hon. Richard L. Brodsky
New York State Assembly
LOB 422
Albany, NY 12248

Dear Assemblyman Brodsky,

The Information Technology Law Committee (the “Committee”) of the New York City Bar Association addresses legal and policy issues relating to information technology. As Chair of the Committee, I write today to offer our thoughts on A1393, the “Online Consumer Protection Act.”

On February 12, 2009, the Federal Trade Commission (“FTC”) released a report titled, *Self-Regulatory Principles For Online Behavioral Advertising* (“Guidelines”).¹ The report outlines self-regulatory guidelines for the online advertising industry relating to the collection of information online, and addresses “first party” or “intra-site” collection and use of data, and online contextual advertising.

In his concurring statement to the Guidelines, then-FTC Commissioner Jonathan Leibowitz stated that, unless industry does “a better job of meaningful, rigorous self-regulation . . . it will certainly invite legislation by Congress and a more regulatory approach by our Commission.” He further admonished, “This could be the last clear chance [for industry] to show that self-regulation can – and will – effectively protect consumers’ privacy . . . online.”² On February 27, 2009, President Obama appointed FTC Commissioner Leibowitz as FTC Chairman. Chairman Leibowitz continues to indicate that he intends to be an aggressive consumer protection enforcer and privacy advocate. Indeed, Chairman Leibowitz recently stated, “From my perspective, the industry is pretty close to its

¹ The Guidelines are available at www.ftc.gov/os/2009/02/P085400behavadreport.pdf.

² Chairman Leibowitz’s Concurring Statement is available at www.ftc.gov/os/2009/02/P085400behavadleibowitz.pdf.

last chance to demonstrate” that it can regulate itself.³ He has also expressed a preference for marketers to obtain opt-in consent before tracking consumers online.⁴

Because the FTC is actively working in this area with proposed nationwide standards, the Committee strongly recommends that the New York State Legislature defer to the FTC at this time. Accordingly, the Committee does not support or otherwise offer substantive comments on A1393.

Respectfully Submitted,



Jeffrey D. Osterman

Chair

Information Technology Law Committee

³ Remarks of FTC Chairman Jonathan Leibowitz, Reuters Global Financial Regulation Summit, as quoted in *FTC Says Internet Firms Near “Last Chance,”* Thomson Reuters, April 27, 2009, available at www.reuters.com/article/technologyNews/idUSTRE53Q4AZ20090427.

⁴ Comments of FTC Chairman Jonathan Leibowitz, C-SPAN interview, *FTC’s Leibowitz Opts For BT Opt-In*, The Daily Online Examiner, May 12, 2009, available at www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=105954. Chairman Leibowitz stated, “Opt-out isn’t illegal necessarily, but I think the better practice is opt-in.”