STATE PRIVACY & SECURITY COALITION

March 6, 2024

Chair Michael Marcotte
Vice Chair Stephanie Jerome
House Committee on Commerce & Economic Development
115 State Street
Montpelier, VT 05633

Re: H.121 – (Omnibus Privacy)

Dear Chair Marcotte, Vice Chair Jerome, and Members of the Committee,

The State Privacy and Security Coalition (SPSC), a coalition of over 30 companies and six trade associations in the retail, telecom, tech, automotive, and payment card sectors writes in opposition to the current draft of H.121. SPSC has a long history of working collaboratively in Vermont on issues such as the VT Student Online Personal Information Protection Act and updates to the state data breach notification law. We also believe that comprehensive privacy laws can both provide consumers with increased control and transparency over their data while maintaining operational workability and cybersecurity integrity for businesses.

Our concerns primarily stem from including a private right of action in the bill, the new definition of "consumer," which has significant anti-privacy consequences, and the definition of "targeted advertising," which significantly deviates from a definition that is nearly universal among all states with a comprehensive privacy framework, and has not been controversial. Fixing these three issues will result in a more comprehensive, balanced approach to consumer privacy.

The Private Right of Action Will Make Consumers Less Safe

Including a private right of action would create massive class action litigation exposure for any *alleged* violations of the law by commercial entities, significantly deterring uses of biometric data including for anti-fraud, authentication and other security purposes that benefit consumers. As in Illinois, the result would be to enrich trial lawyers without striking a balance that allows the use of biometric data for purposes that benefit Vermont residents. Put simply, a private right of action means businesses will be much less likely to offer services that keep Vermont residents' identities safe.

The litigation numbers bear this out: in the last five years, trial lawyers have filed *more than 1000 class action lawsuits based on BIPA.* 14 years of experience with Illinois' law have shown that this approach leads businesses to decline to offer their full suite of services to state residents, or avoid offering their services in the state at all, due to the overzealous litigation this legislation catalyzed. For this reason, Illinois is considering amending the law in order to address this significant unintended consequence and bring beneficial services back to Illinois consumers.

This is because plaintiff trial lawyers' legal strategy to extract settlements does not rest on the merits of the case, but instead on the opportunity to inflict asymmetrical discovery costs on businesses both small and large – with a cost to defend these frivolous actions averaging $500,000. These heavy costs to defend cases through summary judgment gives trial lawyers, who bear no or minimal discovery costs, huge negotiating leverage for nuisance settlements, even if the defendant is compliant with the law.

Furthermore, studies have revealed that private rights of action fail to compensate consumers ***even when a violation has been shown***, and instead primarily benefit the plaintiff's bar by creating a "sue and settle" environment.[1] This is not to say that Vermont lacks effective enforcement options outside the trial bar – to the contrary, it has a strong consumer protection statute that the Attorney General can use *right now* to punish bad actors. On the other hand, the PRA in Illinois has not only failed to meaningfully protect consumers, but actually made them less safe, as anti-fraud, convenient authentication, and other beneficial services leave the state because of abusive litigation risk.

Studies also reveal that the consumer class action system is inherently flawed, as it repeatedly fails to deliver any meaningful benefit to consumers.[2] Notably, a study by the Consumer Financial Protection Bureau found that, of its sample of 562 cases, 87% of resolved class actions resulted in no benefit to absent class members— i.e., they were either dismissed by the court or settled with the named plaintiff only.[3] Importantly, even in cases where consumers receive a portion of a monetary award, most of that money goes to the attorneys or others who were not class members.[4]

The New Definition of Consumer Will Create an Anti-Privacy Landscape for Consumers Traveling To and From Vermont

While the intent of the change to the "consumer" definition is understandable, the practical consequences of this change have significant anti-privacy consequences for precisely those individuals that this definition seeks to encompass – individuals traveling in and out of the state.

With the possibility that individuals traveling into the state will have privacy rights only for a defined period of time that they are within state boundaries, compliance will likely mean that a company will have to a) geofence the state, and b) track the movement of ***any individual who crosses that boundary coming into the state and leaving the state***. The net outcome of this is that companies will have to ***dramatically increase*** their data collection on individuals to comply with this law, rather than limit it.

---

[1] Mark Brennan et al., *Ill-Suited: Private Rights of Action and Privacy Claims*, U.S. Chamber Institute for Legal Reform (July 2019).
[2] John H. Beisner, et al., *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, Chapter 3 Class Actions Benefit Attorneys – Not Consumers, U.S. Chamber Institute for Legal Reform (August 2022).
[3] *Id.*
[4] *Id.*

Pursuant to the discussion during my testimony last week, we will work with the committee on a solution to this issue in the coming weeks.

The New Definition of "Targeted Advertising" Needlessly Departs from Accepted Standards with Confusing and Detrimental Consequences for Businesses and Consumers

The most recent draft of H.121 dramatically departs from an accepted definition of targeted advertising that has not been controversial in the thirteen other states that have implemented a version of this framework. It has not been controversial because it has the following virtues:

- It appropriately distinguishes between first- and third-party marketing;
- It is clear and understandable;
- Its exceptions clearly and sensibly demarcated what was not targeted advertising.

We are concerned about the new definition because it is not found anywhere else in a state privacy law and would restrict first-party advertising, which the US Supreme Court has protected as permitted expression in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), which stemmed from a Vermont law attempting to restrict pharmaceutical marketing.

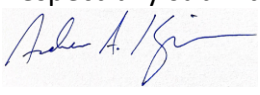
Additionally, it would prohibit the use of sensitive data for all marketing, which means that products or services geared toward historically marginalized populations would not be able to be offered to these individuals. In a state that strives to support diversity and inclusion, ensuring that all individuals have the ability to access goods and services that they can utilize is critical.

SPSC strongly supports heightened protections for sensitive data such as requiring opt-in consent for any processing of it – but we do not believe that particular uses should be banned without providing the consumer an opportunity to exercise control over the data.

This provision would also significantly hinder the ability of companies who provide services such as hair loss treatment or skin care products from advertising their own products to their own customers, because they would be dealing with consumer health data. It could also hinder the ability of entities offering reproductive care to advertise to their services to their clients or past customers.

As stated above, SPSC members understand the concerns in Vermont and would like to be helpful in arriving at a solution that works for all. We respectfully ask this Committee to remove the private right of action and keep any future amendments within the bounds of established comprehensive privacy frameworks such as Connecticut and Colorado, as they represent the strongest protections for consumers while still providing operational workability for businesses.

Respectfully submitted,



STATE PRIVACY & SECURITY COALITION

Andrew A. Kingman
Counsel, State Privacy & Security Coalition