

Vermont Small Business Law Center

Comments Regarding H.121

4/15/2024

Education is crucial for small businesses to understand and meet complex regulations. Over the last several years, we've educated hundreds of business owners on a range of legal issues, including how to handle data privacy. Unfortunately, most small business owners in Vermont, unless they're financially equipped to develop robust data privacy strategies or obtain cyberinsurance, often struggle with understanding the existing data privacy laws, recognizing protected information, and knowing how to secure it.

Our experience shows that tailored legal educational sessions boost small business owners' confidence in their ability to comply with these demanding regulations. Moreover, offering them a few hours of free legal counsel alongside these educational sessions significantly aids them in establishing a sound legal basis and ensuring compliance.

Regarding the benefits of a "safe harbor" compliance process, we've noticed that small business owners frequently ask how they can affordably comply with data privacy laws. They're curious about preventing breaches, finding reliable cyber insurance options, the costs involved, and what needs to be included in a data privacy policy to ensure compliance.

If the data privacy law could define a straightforward set of actions for business owners to achieve compliance, it would clear up many of their questions. The recent 2022 legislation for residential construction contractors (now at 26 VSA 5501 et seq) is a good reference point. It involves a certification program, specific insurance requirements, and clear contract terms. This approach could be similarly beneficial if we establish a safe harbor for data privacy, including registering with the state to verify the maintenance of robust data privacy policies and adequate cyber insurance coverage.

Introducing a phased approach to implementing H.121 would be beneficial. Starting with medium and large businesses that are already familiar with ISO and SOC data privacy standards would allow adequate time for smaller enterprises to access necessary legal education. These more experienced businesses could participate in a public comment phase to inform the process, and iterations of the standards. This tiered rollout, spread over two to three years, would also facilitate a detailed examination of the standards and ensure that small and micro-businesses are well-prepared by the time the law takes effect.

In light of the swiftly evolving tech landscape, establishing a committee composed of experts in technology, business, and law to review and recommend privacy policy standards is critical. This group would ensure that the policies are thoroughly considered and informed by expertise. Micro-business owners, such as small artisans or family-owned maple producers, would particularly benefit from a well-defined and well-tested safe harbor privacy policy standard shaped by this committee. This approach could also take into account public data privacy concerns, the financial and operational capacity of micro-businesses to meet these standards, and the potential compliance costs. Micro businesses are typically characterized by having no more than 9 employees and generating less than \$250,000 annually in revenue (see <https://www.wolterskluwer.com/en/expert-insights/what-is-a-micro-business> and <https://advocacy.sba.gov/wp-content/uploads/2019/06/508FINALAug17Microbusiness.pdf>).

Although the California Consumer Protection Act (CCPA) provides a robust model for data privacy, it might not align perfectly with Vermont's smaller scale business environment. A customized safe harbor tailored for Vermont's micro-businesses would likely involve much lower thresholds than those set by the

CCPA (\$25M gross revenue, 50k unique consumers' PII, or 50% of annual revenue from data sales) or Connecticut's laws (100,000 consumers, or 25,000 or more consumers + 25% of annual revenue from data sales). We recommend that the committee carefully assess the real-world data processing activities of Vermont's micro-businesses to determine suitable exclusions that are realistically aligned with their capabilities and impacts.

Key points summary:

Establish a multi-disciplinary committee

Form a committee comprising technology, business, and law experts to ensure a comprehensive understanding of the complexities involved in data privacy standards. This committee will review existing standards, assess the rapidly evolving technological landscape, and recommend adaptable safe harbor standards. This approach ensures the standards are relevant when drafting and may be reviewed by this standing committee as technology evolves.

Phased implementation strategy

Implement the data privacy law in phases, starting with education and an invitation for medium and large businesses familiar with ISO and SOC data privacy standards to contribute to comment and rulemaking processes. This phased approach allows for a smoother transition, giving businesses ample time to understand and comply with the new standards. It also provides an opportunity to refine these standards through an iterative public comment process, especially with businesses experienced in data privacy compliance.

Focus on understandable safe harbors for micro-sized businesses

Develop clear, committee-approved safe harbor privacy policy standards specifically for micro businesses, with a tiered rollout over two to three years. Given micro-businesses' limited resources and capacity, it's crucial to offer well-defined, achievable, and cost-effective standards. This ensures these businesses are not disproportionately burdened and have sufficient time to prepare for compliance.

Gather information

Before setting thresholds for micro-business exemptions, gather information about these businesses' average aggregate data processing activities. This information will inform the creation of "right-sized" exclusions, ensuring that the law's provisions are tailored to the realities of business in the state. The goal is to protect consumer data without stifling micro-business operations.