S. 71 and S. 93 TESTIMONY

Vermont Ski Areas Association

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Thank you, Chair Harrison and Committee, for opportunity to testify on S. 71 and S. 93 this afternoon.

The Vermont Ski Areas Association, also known as Ski Vermont, is a non-profit trade association with 22 alpine and 26 cross country ski area members across the state. Our members range in size from volunteer-run community areas, all the way to the state's largest ski resorts. The ski industry creates approximately $1.6 billion in economic activity and is an economic and employment driver in rural parts of our state where many ski areas are located.

Most of the Committee members have one or two of our ski area members in your districts, so I appreciate your time today and want to thank you for your work on this important issue.

We support strong consumer protection around data privacy, but Vermont's approach should be balanced with practical and tested definitions and provisions so that businesses have a clear path to compliance. Further, we must not put our businesses at unnecessary legal risk.

In their testimony on Tuesday, the Vermont Chamber detailed a number of issues in S. 71 that are problematic for businesses. Today, I will focus on three areas in particular that would negatively impact our members, but this is not an exhaustive list. I am going to speak to both bills.

1. First Party Advertising: S. 71 Section §2415 (22) (page 7)
The bill allows businesses to utilize their consumer data to advertise directly to their customers. However, many businesses, including many ski areas, utilize a trusted customer relationship management, or "CRM", vendor to execute this type of advertising. The bill does not allow for this under this definition, thus severely limiting their ability to use first-party advertising, even though the bill technically allows it.

2. Data Minimization. S. 71 Section 2419 (a) (1) (page 32)
S. 71 includes data minimization requirements that are overly restrictive and that use untested terms. The bill limits collection of data by a business to what is "reasonably necessary and proportionate." However, "reasonably necessary and proportionate" has not been used in other jurisdictions with respect to data collection and it may not be clear to a business what this really means. What's more, it introduces a subjective grey area that could be the subject of a dispute between a business and a consumer. And, when coupled with the private right of action in this bill, depending on the data collected, this could become a lawsuit against that business. Which is why clear and tested definitions are so important in this bill.

Section §2419 (a) (1) (A) of S. 71 (also on page 32) says (collection and processing of data) must be limited to: "a specific product or service requested by the consumer and a communication that is not an advertisement and that is reasonably anticipated by the consumer within the context of the relationship between the controller (business) and the consumer." This has the effect of prohibiting targeted advertising and limiting a business' competitiveness. (Example: A ski area wouldn't be able to promote their summer activities, like mountain biking or golf, to guests who buy lift tickets and visit during the winter. If a ski area can't cross sell visits in other seasons to the bulk of their guests, this is detrimental not only to the ski area's business but also to businesses in their local communities.)

By contrast, S. 93 (Section § 2420 (a) (1) (page 23) includes data minimization requirements, as well, but the limitations are linked to their disclosure to the consumer. It allows a controller to collect and process data that is "adequate, relevant, and reasonably necessary in relation to the purposes for which the data is processed, as disclosed to the consumer…". So, with proper disclosure, this bill does permit data to be utilized for targeted advertising. And it allows consumers to opt out.

Many consumers appreciate targeted advertising to inform them of products, services, benefits, or savings that may be available and interesting to them. And if they don't want this type of advertising, the bill allows them to opt out of receiving it. So, this approach gives consumers the choice to receive the information they want to receive from businesses, rather than making the choice for them by prohibiting businesses from providing it altogether.

3. Private Right of Action (PRA) S. 71 Section § 2424 (d) (1) and (d) (2) (A) (pages 57-58)
The bill includes a private right of action against larger businesses that could readily be used by unscrupulous lawyers to bring class action lawsuits with little effort on their part. The bill includes liquidated damages of $5,000 or actual damages, if greater, plus the possibility of obtaining punitive damages and attorney's fees. This will put a target on our larger businesses, including perhaps some ski areas, for class action lawsuits which will benefit the lawyers but not consumers. Beyond the financial risk, it creates a large body of work for a business to respond to a demand of this nature – and there is a cost to that as well.

Other states with comprehensive data privacy laws have declined to include a private right of action, and for good reason. Inclusion of a PRA will not create a better climate for compliance, and it will make our state more unfriendly to business. Most businesses will want to comply, but this is a very dense and complex bill. To saddle businesses with a PRA that hangs the threat of potential lawsuits over them as they are coming into compliance will put businesses at risk. I'll also add that businesses will need education, guidance and assistance to help them be successful with compliance.

A better approach would be to pass S. 93, which gives enforcement authority to the Attorney General. Allow businesses to get into compliance and then the Legislature can review the report required in the bill from the Attorney General's Office to determine the number and nature of violation notices they have filed to determine whether changes in enforcement are necessary. This approach will allow our businesses to be successful with compliance and for Vermont to right size our enforcement guided by what is happening in our state, rather than what advocates from outside our state think is best for Vermont.

In closing: S. 71 uses untested definitions and concepts and would limit businesses' ability to serve their customers, create compliance challenges for businesses and put larger businesses at unnecessary legal risk. It would make Vermont businesses less competitive with those in other states, which will weaken our economy and our tax revenues.

By contrast, S. 93 gives consumers control over their personal information and requires opt-in consent for processing of sensitive data by businesses. It requires businesses to disclose data use, obtain clear consent, and process data responsibly. It uses tested definitions and concepts that align with other states and gives businesses a clear path for compliance, while still allowing them to responsibly market to existing or new customers and be competitive.

Many of us – legislators, the Attorney General and businesses -- have said we want to pass a data privacy bill to protect Vermont consumers. I urge you to move forward with S. 93 now and assess how it is working before we contemplate more drastic measures that limit consumer choice about information they receive from businesses, make our businesses less competitive and put our economy at risk.

Thank you for your time and attention.