



February 1, 2024

Representative Michael Marcotte  
Chair of the House Committee on Commerce and Economic Development  
106 Private Pond Rd.  
Newport, VT 05855

Representative Stephanie Jerome  
Vice Chair of the House Committee on Commerce and Economic Development  
PO Box 65  
Brandon, VT 05733

Representative Logan Nicoll  
Ranking Member of the House Committee on Commerce and Economic Development  
11 Depot St.  
Ludlow, VT 05149

**RE: Ad Trade Letter in Opposition to Vermont H. 121**

Dear Chair Marcotte, Vice Chair Jerome, and Ranking Member Nicoll:

On behalf of the advertising industry, we respectfully oppose Vermont H. 121, Draft 6.1,<sup>1</sup> and we offer this letter to express our non-exhaustive list of concerns about this legislation. We and the companies we represent, many of whom do substantial business in Vermont, strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, H. 121 would impose uneven requirements on different sectors of the digital economy and would create disharmony with current state-level privacy laws. Vermont consumers deserve holistic privacy protections that are reasonably aligned with the privacy rights available to consumers in other states. By the same measure, Vermont businesses deserve assurances that they are not being disadvantaged as compared to enterprises in other states. We acknowledge that this is a complex task, and we encourage you to appropriately weigh these factors in striking a more reasonable balance which benefits consumers and the businesses which support so many Vermont jobs. We therefore encourage the House Committee on Commerce and Economic Development (“Committee”) to update the bill to reflect the approach taken in the majority of other state privacy laws before advancing it through the legislative process.

As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, including Vermont. These companies range from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product (“GDP”) in 2020.<sup>2</sup> Our group

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<sup>1</sup> Vermont H. 121, Draft 6.1 (Gen. Sess. 2024), located [here](#) (hereinafter, “H. 121”).

<sup>2</sup> John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located at <https://www.iab.com/wp->

has more than a decade's worth of hands-on experience it can bring to bear on matters related to consumer privacy and controls. We would welcome the opportunity to engage with the Committee further on the points we discuss in this letter.

## **I. Vermont Should Take Steps to Harmonize its Approach to Privacy with Other State Laws**

We and our members support a national standard for data privacy at the federal level. In the absence of such a national standard, it is critical for state legislators to seriously consider the costs and confusion to both consumers and businesses that will accrue from a patchwork of differing privacy standards across the states. Harmonization with existing privacy laws is essential for creating an environment where consumers in Vermont have a consistent set of expectations and the same rights as individuals in other states, while minimizing compliance costs for businesses operating in Vermont. Compliance costs associated with divergent—and oftentimes conflicting—privacy laws are significant. To make the point: one report found that differing privacy laws could impose costs of between \$98 billion and \$112 billion annually, with costs exceeding \$1 trillion dollars over a 10-year period and small businesses shouldering a significant portion of the compliance cost burden.<sup>3</sup> We acknowledge that it is popular to think that these costs will impact only the biggest of companies, but in truth these costs (and any reduction in competition) will flow down to local retailers, travel destinations, recipe publishers, farm stands, restaurants, and myriad other small businesses who see digital advertising as the lifeblood of attracting customers. We encourage the Committee to take steps to align H. 121 with the majority of other state privacy laws that have been enacted.

## **I. H. 121's Data Broker Opt-Out Rights Are Unclear, Duplicative, and Unnecessary**

H. 121 would enact entirely novel data-broker specific opt-out provisions. As drafted, the bill would require data brokers to observe an “individual opt-out,” permitting consumers to request that a data broker stop collecting data, delete all data in its possession about the consumer, and stop selling personal data about the consumer.<sup>4</sup> The bill would also require data brokers to observe a “general opt-out,” permitting a consumer to request that all data brokers registered with the Secretary of State honor an opt-out request submitted via an online form to the Secretary of State.<sup>5</sup> The proposed opt-out rights are significantly unclear, as the bill provides little to no clarity regarding the differences between these opt-out rights or how they work together. Moreover, bill already permits consumers to opt out of sales, targeted advertising, and profiling by all controllers—including data brokers. The data-broker specific opt-out rights are therefore

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[content/uploads/2021/10/IAB\\_Economic\\_Impact\\_of\\_the\\_Market-Making\\_Internet\\_Study\\_2021-10.pdf](#) (hereinafter, “Deighton & Kornfeld 2021”).

<sup>3</sup> Daniel Castro, Luke Dascoli, and Gillian Diebold, *The Looming Cost of a Patchwork of State Privacy Laws* (Jan. 24, 2022), located at <https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws> (finding that small businesses would bear approximately \$20-23 billion of the out-of-state cost burden associated with state privacy law compliance annually).

<sup>4</sup> H. 121 at § 2448(a).

<sup>5</sup> *Id.* at § 2448(b).

duplicative of rights already contained in the bill. H. 121 would stand up these novel data broker choice structures without providing sufficient detail regarding how they will be managed. This constellation of rights will confuse and frustrate consumers and businesses alike. The opt-out rights in the bill should be harmonized with terms and opt-out rights in other states, and Vermont should not subject different entities in the digital economy to differing obligations.

## **II. The Bill's Private Right of Action Should Be Removed**

As drafted, H. 121 would permit a private right of action for violations of its provisions.<sup>6</sup> We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the Vermont Attorney General ("AG") because such an enforcement structure would lead to strong outcomes for Vermonters while better enabling businesses to allocate resources to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements. AG enforcement, instead of a private right of action, is in the best interests of consumers and businesses alike.

The private right of action in H. 121 will create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions will flood Vermont's courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm. Private right of action provisions are completely divorced from any connection to actual consumer harm and provide consumers little by way of protection from detrimental data practices.

Additionally, a private right of action will have a chilling effect on the state's economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of law. Private litigant enforcement provisions and related potential penalties for violations represent an overly punitive scheme that do not effectively address consumer privacy concerns or deter undesired business conduct. They expose businesses to extraordinary and potentially enterprise-threatening costs for technical violations of law rather than drive systemic and helpful changes to business practices. A private right of action will also encumber businesses' attempts to innovate by threatening companies with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies. The threat of an expensive lawsuit may force smaller companies to agree to settle claims against them, even if they are convinced they are without merit.

Beyond the staggering cost to Vermont businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based on differing court outcomes. Overall, a private right of action would serve as a windfall to the plaintiff's bar without focusing on the business practices that actually harm consumers. We therefore encourage legislators to remove the private right of action from the bill and replace it with a framework that makes enforcement responsibility the purview of the AG alone.

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<sup>6</sup> *Id.* at § 2424(a).



**We ask the Committee to decline to move forward with H. 121 and to instead amend the bill to reflect the approach of the majority of states that have passed privacy laws.** As currently drafted, the bill sets forth a legal approach that would hinder Vermonters' ability to reap the benefits of a vibrant, ad-supported online ecosystem and Vermont businesses' ability to thrive.

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We welcome the opportunity to engage with you further about workable privacy standards to help ensure Vermonters maintain their access to and benefits from the information economy.

Thank you in advance for your consideration of this letter.

Sincerely,

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CC: Members of the House Committee on Commerce and Economic Development

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