February 1, 2024

Senator Virginia Lyons
Chair of the Senate Committee on Health and Welfare
241 White Birch Lane
Williston, VT 05495

Senator David Weeks
Vice Chair of the Senate Committee on Health and Welfare
35 Warner Ave,
Proctor, VT 05765

RE: Letter in Opposition to Vermont My Health My Data Act (S. 173)

Dear Chair Lyons and Vice Chair Weeks:

On behalf of the advertising industry, we write to oppose Vermont S.173.[1] We offer this letter to express our non-exhaustive list of concerns about this legislation. Our organizations support the enactment of meaningful privacy protections for Vermonters. However, as presently drafted, S. 173 would have far-reaching, unintended, and unfavorable consequences for Vermont consumers and the business community alike. We therefore strongly encourage you to decline to advance the bill any further in the legislative process.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. 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. Our group 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 further with the Senate Committee on Health and Welfare ("Committee") to discuss the issues we catalog in this letter.

I. The Bill's Definition of "Consumer Health Data" is Overly Broad

The bill's terms, coupled with its overly broad definition of "consumer health data," could unintentionally impede Vermonters from receiving useful and relevant information about products and services they may desire. As defined, the term "consumer health data" would include any information that could possibly be related—however tangentially—to the health of a consumer. The definition could be interpreted to include basic data points, such as the fact that a consumer purchased shampoo at a local grocer, attended a fitness event, or signed up to receive promotional notices about specific clothing or footwear restocks. None of this information is inherently related

[1] Vermont S. 173 (2023-2024 Sess.), located here (hereinafter, "S. 173").

to consumer health, but the bill's broad definition of "consumer health data" could sweep such information into its ambit.

The bill should be updated to narrow the definition of the term "consumer health data." We recommend that the Committee align the bill's definition of "consumer health data" with the majority of states that have passed consumer health data-specific legislation, such as the definitions of the term in the Nevada and Connecticut laws. In those state laws, consumer health data is personal information that is linked or reasonably capable of being linked to a consumer and that "is used to identify" the past, present or future health status of the consumer. This definition will help ensure that the definition is cabined to information an entity actually uses to identify a consumer's health status, and that basic data points unrelated to a consumer's actual physical or mental health are not unintentionally swept into the definition of the term.

II. The Bill's Consent Requirements Will Cause Consumer Frustration Without Providing Meaningful Privacy Protections

Additionally, and in part due to the bill's broad definitions, the requirement to obtain consent every time a regulated entity collects, shares, or sells consumer health data would inundate Vermonters with an overwhelming number of consent requests for basic data processing activities. This requirement would result in significant consent fatigue for Vermonters instead of providing meaningful privacy protections for consumers. S. 173's detrimental—and likely unintentional—consequences would hinder consumers from receiving significant benefits associated with routine and essential data practices while simultaneously placing overly burdensome requirements on regulated entities that process any information that could even vaguely be related to consumer health.

III. Requiring Disclosure of Specific Third Parties and Affiliates Creates Competition Concerns and Significant Operational Burdens

S. 173 would require regulated entities to provide a consumer with a list of all third parties and affiliates with whom the regulated entity shared or sold consumer health data and an active e-mail address or other online mechanism that the consumer can use to contact such third parties in response to a consumer's access request.[2] Requiring documentation or disclosure of the names of third parties and affiliates would be significantly operationally burdensome, as regulated entities change business partners frequently, and companies regularly merge with others and change names. For instance, a regulated entity may engage in a data exchange with a new partner on the same day it responds to a consumer access request. This requirement would either force the regulated entity to refrain from engaging in commerce with the new partner until its access disclosures are updated, or risk violating the law. This is an unreasonable restraint. From an operational standpoint, constantly updating a list of all third-party partners a regulated entities works with would take significant resources and time away from companies' efforts to comply with other new privacy directives in S. 173.

[2] *Id.* at 1896(a).

In addition, the requirement to disclose third party names presents significant competition concerns without providing meaningful consumer protection. Mandating companies to disclose the names of their third-party partners could obligate them to abridge confidentiality clauses they maintain in their contracts with partners. The requirement could needlessly expose proprietary business information to a regulated entity's competitors. Finally, the consumer benefit that would accrue from their receipt of a list of third parties and affiliates to whom a regulated entity discloses data would be minimal at best. At a time when legal requirements are causing privacy notices to become significantly lengthy and complicated to meet the letter of the law, requiring a list of third parties that have received consumer health data will only add to the length and confusion of required notices. For these reasons, the requirement to disclose specific third parties and affiliates that have received consumer health data should be removed from S. 173.

IV. A Private Right of Action Is an Inappropriate Form of Enforcement for Privacy Legislation

As presently drafted, S. 173 does not clarify whether or not it permits a private right of action.[3] The Committee should add language to the bill that explicitly states it would not permit private citizens to bring claims for alleged violations. We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the AG alone because such an enforcement structure would lead to stronger outcomes for Vermont residents 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 potential for a private right of action in S. 173 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.[4] 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

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[3] *Id.* at § 1899b(a).

[4] A select few attorneys benefit disproportionately from private right of action enforcement mechanisms in a way that dwarfs the benefits that accrue to the consumers who are the basis for the claims. For example, a study of 3,121 private actions under the Telephone Consumer Protection Act ("TCPA") showed that approximately 60 percent of TCPA lawsuits were brought by just forty-four law firms. Amounts paid out to consumers under such lawsuits proved to be insignificant, as only 4 to 8 percent of eligible claim members made themselves available for compensation from the settlement funds. U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* at 2, 4, 11-15 (Aug. 2017), located here.

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.[5] We ask the Committee to clarify that S. 173 does not create a private right of action.

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We and our members support protecting consumer privacy. We believe, however, that S.173 takes an overly broad approach to the collection, use, and disclosure of any data that could possibly be related to or indicative of consumer health. We therefore respectfully ask the Committee to reconsider the bill. We would also very much welcome the opportunity to engage with the Committee further regarding an appropriate way to define "consumer health data" so Vermonters can enjoy robust protections without forfeiting the ability to receive benefits from the modern data-driven economy.

Thank you in advance for your consideration of this letter.

Sincerely,

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CC: Members of the Senate Committee on Health and Welfare

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[5] For instance, in the early 2000s, private actions under California's Unfair Competition Law ("UCL") "launched an unending attack on businesses all over the state." American Tort Reform Foundation, *State Consumer Protection Laws Unhinged: It's Time to Restore Sanity to the Litigation* at 8 (2003), located here. Consumers brought suits against homebuilders for abbreviating "APR" instead of spelling out "Annual Percentage Rate" in advertisements and sued travel agents for not posting their phone numbers on websites, in addition to initiating myriad other frivolous lawsuits. These lawsuits disproportionately impacted small businesses, ultimately resulting in citizens voting to pass Proposition 64 in 2004 to stem the abuse of the state's broad private right of action under the UCL. *Id.*