



January 6, 2021

The Honorable Sen. David W. Marsden  
900 E. Main Street  
Pocahontas Building, Room No. E618  
Richmond, VA 23219

**RE: Virginia Consumer Data Protection Act**

Dear Senator Marsden:

On behalf of the digital advertising industry, thank you for the opportunity to provide comments on the Virginia Consumer Data Protection Act (“CDPA” or “Act”). As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies, is responsible for more than 85 percent of U.S. advertising spend, and drives more than 80 percent of our nation’s digital advertising spend.

We believe consumer privacy is an exceedingly important value that deserves meaningful protection in the marketplace. We also believe is of paramount importance to maintain a thriving Internet and information-driven economy, where robust innovation drives strong economic growth, employing millions of Americans and providing transformative benefits for consumers. It is vital that consumer privacy legislation appropriately account for these key objectives.

A federal data privacy law would best serve Virginians and consumers across the country by providing them with equivalent data rights and protections no matter where they live. To the extent states and the Commonwealth enact privacy legislation, harmonizing terms with similar provisions in other state laws would benefit consumers and businesses alike. We provide the following comments in the spirit of fostering uniformity across privacy laws and clarity in the CDPA so that consumers enjoy consistent privacy protections and businesses benefit from consistent, and not conflicting, legal directives. We look forward to continuing to work with you as the Virginia General Assembly considers the CDPA during the upcoming session.

**I. Enforcement of the CDPA Should Remain Vested in the Attorney General Alone**

As presently drafted, the CDPA places sole enforcement authority within the purview of the Commonwealth’s Attorney General.<sup>1</sup> We support this approach, as it would lead to strong outcomes for consumers while better enabling businesses to allocate funds to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements.

Private rights of action create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood the 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.

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<sup>1</sup> CDPA, §§ 59.1-579 - 580.

We encourage legislators to keep the CDPA's enforcement provision as-is and refrain from including a private right of action in the bill.

## II. The Act's Pseudonymous Data Exemption Should Be Clarified

The CDPA states: "The rights contained in § 59.1-574 shall not apply to pseudonymous data in cases where the controller is able to demonstrate that any information necessary to identify the consumer is kept separately and is subject to effective technical and organizational controls that prevent the controller from accessing such information."<sup>2</sup> However, § 59.1-574 does not discuss consumer rights provided by the CDPA; instead, it sets forth business responsibilities and transparency requirements under the Act. It appears the draft text should be amended to cross reference § 59.1-573 instead, as this section sets forth Virginians' rights under the CDPA.

The free flow of pseudonymous data has helped power the growth of the Internet by enabling innovative tools and services for consumers and businesses to connect and communicate, and by its very nature, is maintained in privacy-friendly form as it does not include the types of personal data that identify a specific natural person like a name or postal address. In addition to the pseudonymous data exemption clarification we request above, our organizations have the following additional recommendations for the CDPA as presently drafted:

- **Essential ad operations should be excluded from the definition of "sale of personal data."** The CDPA would provide consumers with the right to opt out of "sales of personal data" as well as a separate opt out right for "targeted advertising."<sup>3</sup> While the definition of targeted advertising explicitly excludes essential ad operations that are imperative for the Internet to work, such as processing for measuring or reporting advertising performance, reach, or frequency, the definition of sale broadly applies to any exchange or processing of personal data for monetary consideration.<sup>4</sup> The definition of sale could therefore be read to capture essential ad operations, meaning that opt outs from sale could impact the functionality of the Internet. We suggest including language in the bill's definition of sale to clarify that the term does not include essential ad operations including ad delivery; measuring or reporting advertising performance, reach, or frequency; and ad fraud prevention.
- **The Act should not require businesses to turn assessments over to the Attorney General.** Businesses should not be required to turn assessments over to the Attorney General upon request,<sup>5</sup> as it would result in the regulator critiquing businesses' privacy practices in hindsight and second-guessing decisions based on a predisposed perspective. We recommend that the General Assembly decline to include these assessments terms in privacy legislation.
- **Virginia should ensure that its consumers' right of access and right to deletion mirrors those same rights in other states' laws.** Virginia should alter the right of access so it applies to personal data "collected about the consumer" instead of "personal data concerning the consumer."<sup>6</sup> This former formulation of the right of access aligns with other state privacy laws such as the California Consumer Privacy Act and would therefore foster consistency across states to the benefit of both consumers and businesses. In addition, Virginia should

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<sup>2</sup> *Id.* at § 59.1-577(B) (emphasis added).

<sup>3</sup> *Id.* at § 59.1-573(A)(5).

<sup>4</sup> *Id.* at § 59.1-571.

<sup>5</sup> *See id.* at § 59.1-576(C).

<sup>6</sup> *Id.* at § 59.1-573(A)(1).

ensure its deletion right does not apply broadly to any personal data “concerning the consumer” and instead applies to personal data collected “from the consumer.”<sup>7</sup> Permitting a consumer to delete any personal data “concerning” them would create a conflict between the CDPA and California law, and it would create a requirement that is overly broad. Without the suggested amendment, the CDPA could extend beyond information that is solely associated with the one consumer making a deletion request, thereby impacting the rights of others. Virginia should ensure its deletion right applies to information collected “from” the consumer.

- **Requiring processors to submit to controllers’ audits and requiring them to make all information available to controllers to demonstrate compliance with the CDPA would be onerous on businesses and impractical in many cases.**<sup>8</sup> These requirements are overly burdensome and will not advance consumer protection. Instead, they will create additional costs for small processor businesses without providing commensurate benefits for consumers. These provisions should be removed from the CDPA.
- **The CDPA should not include an appeals process.**<sup>9</sup> Enabling consumers to appeal businesses’ decisions to decline to act on rights requests for statutorily permitted reasons will force them to justify their lawful policies and will not provide greater privacy protections for consumers. An appeals process would also create unpredictability in businesses’ execution of consumer rights requests and open businesses up to essentially litigating every rights request submitted by a Virginia citizen through the appeals process. It would require businesses to dedicate staff and other resources to respond to appeals, a significant expense that would most acutely impact small businesses during a time when they are already under significant strain due to the pandemic. The General Assembly should not require businesses to provide a process for consumers to appeal their lawful decisions in its privacy bill.

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<sup>7</sup> *Id.* at § 59.1-573(A)(3).

<sup>8</sup> *See id.* at §§ 59.1-575(B)(3), (4).

<sup>9</sup> *See id.* at § 59.1-573(D).

Thank you for your consideration of these comments. We look forward to working further with you on the CDPA. Please contact Mike Signorelli of Venable LLP at [masignorelli@venable.com](mailto:masignorelli@venable.com) with any questions you may have regarding these comments.

Sincerely,

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