April 6, 2023

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 1.1,[1] and we offer this letter to express additional concerns about this legislation. This letter supplements the letter we previously submitted on the bill, as introduced, to the House Committee on Commerce and Economic Development ("Committee") on February 8, 2023. **We urge the Committee to convert the bill into a study so the Vermont General Assembly can gather formal input from interested stakeholders and examine other available approaches to this legislation.**

As drafted, H. 121 contains several internal inconsistencies that would make efforts to comply with its terms an extremely complex endeavor. The bill would also impose different requirements on different entities that power the digital economy in ways that stand in stark contrast to all other state-level privacy laws that have been enacted to date. We strongly agree that Vermont consumers deserve meaningful privacy protections supported by reasonable government policies. Such protections, however, should be aligned with the privacy rights available to consumers in other states. Moreover, as drafted, H. 121 would have extremely detrimental consequences for Vermont's business community, including its smallest businesses that use data broker services to reach potential customers efficiently and at scale. We encourage the General Assembly to undertake a study to work towards an approach to privacy that would create privacy protections for Vermonters while permitting Vermont's businesses to continue to support jobs and economic growth in the state.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, including Vermont. These companies range

[1] Vermont H. 121, Draft 1.1, (Gen. Sess. 2023), located here (hereinafter, "H. 121").

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.[2] 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. While we believe the legislative process would benefit by undertaking a study to examine other state approaches to consumer data privacy, we highlight below our non-exhaustive concerns with H. 121. We would welcome the opportunity to engage with you during a formal study on H. 121's terms.

I. The Bill's Opt Out Rights Are Unclear and Should Be Unified with Opt Out Rights in Other States

As drafted, H. 121 would provide at least five different opt out rights for the following activities: sales, targeted advertising, tracking, predictive analytics, and profiling.[3] On top of those rights, data brokers would be subject to additional "individual" and "general" opt out requirements, further complicating the array of opt out requirements under the bill.[4] The bill provides little to no clarity regarding the differences between the opt out rights or how they work together. For example, the legislation provides no definition of "tracking," and although Draft 1.1 introduces a definition for "predictive analytics," the bill does not explain how this opt out differs from the opt out for "profiling." The bill would stand up these novel 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 rights in the bill should be harmonized with opt out rights in other states, and Vermont should not subject different entities in the digital economy to differing obligations.

II. The Bill's Notice at Collection Requirements Ignore Realities of the Digital Economy

H. 121 would require any data collector to notify a consumer of the categories of personal information to be collected and the purposes for which it will be used "at or before" the point of personal information collection. This requirement fails to account for the fact that many entities in the digital marketplace, such as third party data services companies, do not have a direct touchpoint with the consumer where such notice can be provided.

These third-party data services companies are essential to small businesses' ability to thrive and find new customers. Much as supply chain partners in other sectors in the economy create value, these intermediaries bring specialized techniques and practices for their customers to find and attract new and existing customers. They enable small businesses to leverage more than just the

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[2] 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-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf (hereinafter, "Deighton & Kornfeld 2021").

[3] H. 121, §§ 2433(d)(5), (e).

[4] *Id*. at §§ 2448(a), (b).

data they receive from direct interactions with their niche customer base. Legal requirements for these companies that ignore the ways in which they collect information and provide value to the economy threaten to impact small businesses the most. Information obtained from third parties makes it possible for small and mid-size companies with less resources to spend on advertising to reach as many new potential customers as possible and in the most efficient and accountable ways possible. Small and mid-sized businesses are empowered to compete with larger companies who may have more resources to allocate to broad marketing efforts in large part due to services provided by third parties.

Instead of the present "notice at collection" requirements in H. 121, the bill should adopt an approach that permits companies to meet these requirements by registering with the state's data broker registry. This solution would permit data brokers to continue to provide value to the economy at large and small businesses in particular.

III. The Bill's Private Right of Action for Biometrics Violations Should Be Removed

H. 121 would permit a private right of action for violations of its biometrics provisions.[5] 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

[5] *Id.* at § 2449(b)(2).

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.

We ask the General Assembly to initiate a study of H. 121 and existing approaches to data privacy before moving forward with H. 121. 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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