April 26, 2024

Senator David Zuckerman
President of the Senate (Lt. Governor)
Office of the Lieutenant Governor
115 State Street
Montpelier, Vermont 05633

Senator Philip Baruth
Senate President Pro Tempore
Office of the President Pro Tempore
115 State Street
Montpelier, Vermont 05633

Senator Alison Clarkson
Senate Majority Leader
Vermont State House
115 State Street
Montpelier, VT 05633

Senator Randy Brock
Senate Minority Leader
Vermont State House
115 State Street
Montpelier, VT 05633

RE: Ad Trade Letter in Opposition to Vermont H. 121, Draft 4.1

Dear Lieutenant Governor Zuckerman, Senate President Pro Tempore Baruth, Senate Majority Leader Clarkson, and Senate Minority Leader Brock:

On behalf of the advertising industry, we respectfully oppose Vermont H. 121, Draft 4.1 (hereinafter, "H. 121"),[1] 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. While the Senate Committee on Economic Development, Housing and General Affairs made critically important amendments to the bill, H. 121 continues to diverge from the majority of state privacy laws in certain areas that would burden businesses without providing meaningful privacy protections or benefits to Vermont consumers. We provide the comments below to illustrate how these divergent terms will, if enacted, hinder access to Internet-based resources in Vermont and impede the continued success of the state's small business community.

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.[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. We would welcome the opportunity to engage with the Senate further on the points we discuss in this letter.

[1] Vermont H. 121, Draft 4.1 (Gen. Sess. 2024), located here (hereinafter, "H. 121").
[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").

I. H. 121's Requirement to Disclose Names of Specific Third-Party Partners, Without Key Trade Secrets Protections, Would Interfere with Legitimate Business and Create Competition Concerns

H. 121 diverges from nearly all state privacy laws by requiring controllers to disclose "a list of third parties, other than individuals, to which the controller has transferred … personal data" upon a consumer's request, without key protections for a controller's trade secrets.[3] The vast majority of other states that have enacted privacy laws do not include this impractical and duplicative requirement, and the one state that has enacted the requirement includes an exemption that expressly states that the provision does not require a controller to disclose its trade secrets.[4] Instead, most other state privacy laws require companies to disclose the *categories* of third parties to whom they transfer personal data rather than the specific names of such third parties themselves.[5]

Requiring documentation or disclosure of the names of entities would be operationally burdensome, as controllers change business partners frequently, and companies regularly merge with others and change names. For instance, a controller may engage in a data exchange with a new business-customer on the same day it responds to a consumer disclosure request. This requirement would either force the controller to refrain from engaging in commerce with the new business-customer until its consumer 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 controller works with would take significant resources and time away from efforts to comply with other new privacy directives in H. 121. And the bill's language giving controllers an option to provide a list of names of third-party partners that receive data about a requesting consumer or a list of third-party recipients of any personal data does little to ease this operational burden.[6] Even with this option, controllers may be forced to jeopardize new business opportunities and relationships just to compile, maintain, update, and distribute these ephemeral lists.

International privacy standards like the European Union's General Data Protection Regulation ("GDPR") also do not require burdensome disclosures of specific third parties in response to data subject access requests, according to the text of the law. Mandating that companies disclose the names of their third-party partners could obligate companies to abridge confidentiality clauses they maintain in their contracts with partners and expose proprietary business information to their competitors. While H. 121 includes a trade secret exemption for consumer requests to access personal data or to receive a portable copy of personal data, the bill would not apply this exemption to requests to receive a list of third parties.[7]

---

[3] H. 121 § 2418(a)(2).
[4] Oregon SB 619, § 3(3).
[5] *See, e.g.,* Cal. Civ. Code § 1798.110; Va. Code Ann. § 59.1-578(C); Colo. Rev. Stat. § 6-1-1308(1)(a); Conn. Gen. Stat. § 42-520(c)(5); Utah Rev. Stat § 16-61-302(1)(a).
[6] H. 121 § 2418(a)(2).
[7] *See id.* §§ 2418(a)(1), (2), (5).

Finally, the consumer benefit that would accrue from their receipt of a list of third-party partners to whom a controller discloses data would be minimal at best. The benefit would be especially insignificant given H. 121 already requires controllers to disclose *categories* of third-party partners in privacy notices for consumers.[8] For these reasons, we encourage the Senate to strike the onerous language requiring disclosure of a list of specific third parties, which severely diverges from the approach to disclosures taken in almost all existing state privacy laws. To align H. 121 with other state privacy laws, the bill should require disclosure of the categories of third parties rather than the names of such third parties themselves.

II. H. 121's De-identification Standards Should Harmonize with the Standards Under Existing State Laws

H. 121 creates additional discord among state privacy laws by potentially mandating controllers meet the Health Insurance Portability and Accountability Act's ("HIPAA") de-identification standards to qualify *any* data as de-identified under the bill.[9] No other state has enacted privacy legislation that requires entities to meet HIPAA de-identification standards. Instead, other states have required commitments to avoid reidentification, to process data in de-identified form, and to contractually obligate others to satisfy these same commitments—obligations that are already in H. 121.[10] By requiring "reasonable measures" and then stating such measures "shall include" the HIPAA de-identification standards, one could read H. 121 as requiring these HIPPA standards—which are tailored to specifically apply to protected health information—for all data. Such an obligation would starkly veer away from a consistent approach to de-identification under current state privacy laws and impose unduly onerous requirements on entities doing business in Vermont. HIPAA de-identification standards were not designed with the processing of general consumer personal data in mind. Accordingly, the bill should be updated so the HIPAA standards "may" serve as one "reasonable measure" for de-identification, but "reasonable measures" for de-identification are "not limited to" such HIPAA standards across the board for all personal data. We recommend that the Senate amend the definition of "de-identified data" to clarify that entities may refer to the HIPAA standards but are not strictly required to comply with these standards to sufficiently de-identify data under the Vermont law.

III. H. 121 Should Clarify Its Anti-Discrimination Language to Avoid Restricting the Delivery of Relevant and Useful Information to Vermont Consumers

Another way H. 121 deviates from state privacy laws currently enacted is the potential, unintended effects of the bill's approach to discrimination. The bill would ambiguously prohibit processing "personal data in a manner that . . . makes unavailable the equal enjoyment of goods or services on the basis of an individual's" demographic characteristics.[11] Other states that have enacted privacy laws generally refer to existing state and federal laws that prohibit unlawful

[8] *Id.* § 2419(d)(1)(E).
[9] *Id.* § 2415(19).
[10] *See id.*; *see, e.g.*, Cal. Civ. Code § 1798.140(m); Va. Code Ann. § 59.1-575; Colo. Rev. Stat. § 6-1-1303(11); Conn. Gen. Stat. § 42-515(13); Utah Rev. Stat § 16-61-101(14).
[11] H. 121 § 2419(b)(3).

discrimination.[12] However, H. 121's reference to "equal enjoyment of goods or services" without qualification could be read to mean that Vermont businesses could not advertise based on gender to connect individuals of any gender with clothing that matches their interests. With this ambiguity, the bill could also undermine legitimate anti-discrimination efforts in Vermont by impeding entities from purposefully reaching out to particular communities with relevant and helpful messaging. Accordingly, we urge the Senate to amend this provision to clarify that a controller shall not "process a consumer's personal data in a manner that discriminates against individuals or otherwise makes unavailable the equal enjoyment of goods or services *for housing, education, employment, healthcare, insurance, or credit opportunities* on the basis of an individual's" demographic characteristics (amended language in italics).

* * *

We welcome the opportunity to engage with you further about workable privacy standards to help ensure Vermont consumers maintain their access to and benefits from the information economy. **We ask the Senate to amend H. 121 in line with the suggestions in this letter to reflect the approach of the majority of states that have passed privacy laws.**

Thank you in advance for your consideration of this letter.

Sincerely,

Christopher Oswald
EVP for Law, Ethics & Govt. Relations
Association of National Advertisers
202-296-1883

Alison Pepper
EVP, Government Relations & Sustainability
American Association of Advertising Agencies, 4A's
202-355-4564

Lartease Tiffith
Executive Vice President, Public Policy
Interactive Advertising Bureau
212-380-4700

Clark Rector
Executive VP-Government Affairs
American Advertising Federation
202-898-0089

Lou Mastria, CIPP, CISSP
Executive Director
Digital Advertising Alliance
347-770-0322

CC: Members of the Vermont Senate

Mike Signorelli, Venable LLP
Allie Monticollo, Venable LLP

[12] *See, e.g.,* Va. Code Ann. § 59.1-578(A)(4); Colo. Rev. Stat. § 6-1-1308(6); Conn. Gen. Stat. § 42-520(a)(5).