H.121 Will Needlessly Put Vermont Businesses at a Regional Disadvantage

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Increasing privacy protections for Vermonters makes eminent sense, and we do not oppose efforts to do so. However, the version passed by the House – amended at the last minute without an opportunity for analysis and feedback – contains overbroad definitions that, particularly if subject to a private right of action, will create havoc in the business community.

- **Simply put, this draft of H.121 will make it easier for VT businesses to interact with NH residents than customers in their own state.**

<u>Overbroad Definitions</u>

- Needlessly overbroad definitions of "biometric data," "precise geolocation data, "sale," and "sensitive data" will cause consumer confusion, to the detriment of consumer privacy.
    - **Biometric data**: would cover far too broad a set of data; VT consumers will be told that biometric data is being collected for things like virtual try-ons when in fact no such data is being collected.
        - Because the definition in NH is narrower, a virtual try-on, or social media filter of "cat ears" would not require consent. In VT, it will.
    - **Precise Geolocation Data**: there is no need to depart from the definition in other state laws that are widely accepted. This definition is drafted in such a way that innocuous information such as billing information will fall within this definition. Again, businesses will be forced to state that they collect "precise geolocation information" simply for mailing information to a residence.
    - **Sale**: The CA-style definition of "sale" – in which even "communicating orally" is considered a sale of personal data – has led to confusion in CA about what businesses are actually doing with consumer data.
        - It will force VT businesses to say that they are selling consumer data when in fact they are doing no such thing.
        - A more conventional definition can still encompass all manner of sharing while hewing more closely to what consumers understand as a sale.

- **Sensitive data**: Novel elements such as "sexuality" and overbroad elements such as the "consumer health data" elements will force businesses to classify routine or innocuous data as "sensitive," confusing consumers and creating unnecessary friction in transactions.
- **Targeted Advertising**: While we understand what the legislature is attempting to do here, having different definitions of "targeted advertising" based on age will be incredibly difficult to understand and implement.
    - It is critical that businesses be able to find new customers and advertise to existing ones. We would like to work on improving this structure.

Loyalty Program Language is Needlessly Burdensome

- Loyalty program language that exists in, e.g., Delaware, Oregon, and CT was carefully negotiated to ensure that businesses cannot discriminate against consumers for exercising their rights, ***but still allow the free function of loyalty programs***.
- The overbroad, open-ended non-discrimination language – not tied to any non-discrimination state law – complicates this issue.
- The nearly-unprecedented language in H.121 would create additional friction in offering loyalty programs, not only in the level of disclosure required, but also in imposing a de facto consent requirement for any loyalty program.
- ***Again, it should not be easier for VT businesses to interact with NH consumers than VT consumers.***

The Private Right of Action Exponentially Exacerbates the Above Issues

- ***No other state has a PRA in their comprehensive privacy law, because it would instantly make the state a less attractive to do business, and is not pro-privacy.***
- ***We can protect consumers' privacy without overwhelming the court system and bankrupting businesses acting in good faith.***
- Issues like whether information might be biometric data, whether a transaction might constitute a sale, or whether a loyalty program transfer of data is "necessary" for the program – along with the rest of this incredibly,

complex, technical law – will be enforced not by subject matter experts, but by the trial bar.

- And yet, ***we know that PRAs have two significant anti-privacy, anti-consumer effects:***
- **Vermonters will likely be less safe.** Put simply, a private right of action means businesses will be much less likely to offer services that keep Vermont residents' identities safe.
    - As it has in Illinois, a private right of action would create massive class action litigation exposure for any ***alleged*** violations of the law by commercial entities, significantly deterring uses of data including for anti-fraud, authentication and other security purposes that benefit consumers.
- **Settlements Will Benefit Trial Lawyers (and consumer groups who benefit from class actions)**
    - Studies show that private rights of action fail to compensate consumers *even when a violation has been shown*, and instead primarily benefit the plaintiff's bar by creating a "sue and settle" environment.[1]
    - Plaintiff trial lawyers' legal strategy to extract settlements does not rest on the merits of the case, but instead on the opportunity to inflict asymmetrical discovery costs on businesses both small and large – with a cost to defend these frivolous actions well into the hundreds of thousands of dollars.
    - Notably, a study by the Consumer Financial Protection Bureau found that, of its sample of 562 cases, 87% of resolved class actions resulted in no benefit to absent class members— i.e., they were either dismissed by the court or settled with the named plaintiff only.[2]
    - Studies also reveal that the consumer class action system is inherently flawed, as it repeatedly fails to deliver any meaningful benefit to consumers.[3]

[1] Mark Brennan et al., *Ill-Suited: Private Rights of Action and Privacy Claims,* U.S. Chamber Institute for Legal Reform (July 2019).
[2] *Id.*
[3] John H. Beisner, et al., *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, Chapter 3 Class Actions Benefit Attorneys – Not Consumers, U.S. Chamber Institute for Legal Reform (August 2022).