

MAJOR ISSUES IN H.121 – COMPARISON WITH OTHER STATES

Vermont Data Privacy Act ("VPA")H.121	Connecticut Data Privacy Act ("CDPA") Public Act No.23-56	New Hampshire Privacy Act SB 255	Delaware Personal Data Privacy Act HB 154	Oregon Consumer Data Privacy Act SB 619	Implications/Unintended Consequences of VT H.121
<p>(4) "Biometric data" means personal data generated from the technological processing of an individual's unique biological, physical, or physiological characteristics that is linked or reasonably linkable to an individual, including:</p> <ul style="list-style-type: none"> • (A) iris or retina scans; • (B) fingerprints; • (C) facial or hand mapping, geometry, or templates; • (D) vein patterns; • (E) voice prints; • (F) gait or personally identifying physical movement or patterns; • (G) depictions, images, descriptions, or recordings; and • (H) data derived from any data in subdivision (G) of this subdivision (4), to the extent that it would be reasonably possible to identify the specific individual from whose biometric data the data has been derived. §2415(4)(A)-(H). 	<p>(4) "Biometric data" means data generated by automatic measurements of an individual's biological characteristics that are used to identify a specific individual, such as a:</p> <ul style="list-style-type: none"> • fingerprint, • voiceprint, • eye retinas, • irises or • other unique biological patterns or characteristics that are used to identify a specific individual. <p>"Biometric data" does not include:</p> <ul style="list-style-type: none"> • (A) a digital or physical photograph, • (B) an audio or video recording, or • (C) any data generated from a digital or physical 	<p>Same as CT.</p>	<p>Same as CT.</p>	<p>(3)(a) "Biometric data" means personal data generated by automatic measurements of a consumer's biological characteristics, such as the consumer's</p> <ul style="list-style-type: none"> • fingerprint, • voiceprint, • retinal pattern, • iris pattern, • gait or other unique biological characteristics <p>That allow or confirm the unique identification of the consumer.</p> <p>(b) "Biometric data" does not include:</p> <ul style="list-style-type: none"> • (A) A photograph recorded digitally or otherwise; • (B) An audio or video recording; • (C) Data from a photograph or from an audio or video recording, unless the data were generated for the purpose of 	<p>Definition of Biometric data:</p> <p>As currently drafted, the definition of biometric data includes a host of data points that would unnecessarily trigger opt-in consent for consumers.</p> <p>It additionally will require businesses to tell consumers they are collecting biometric data when they are, in fact, not doing so.</p> <p>This will be confusing and potentially scary to consumers.</p> <p>For example, under section (H) and (G) <i>any</i> images, depictions or descriptions that would "reasonably" make it a possibility to identify a "specific individual from whose biometric data the data has been derived" could be classified as biometric data.</p>

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	<p>photograph, or an audio or video recording, unless such data is generated to identify a specific individual. <u>Conn. Gen. Stat. § 42-515(4) (2023).</u></p>			<p>identifying a specific consumer or were used to identify a particular consumer; or</p> <ul style="list-style-type: none"> (D) Facial mapping or facial geometry, unless the facial mapping or facial geometry was generated for the purpose of identifying a specific consumer or was used to identify a specific consumer. <u>§1(3)(a)(b)(A)-(C).</u> 	
<p>(32)(A) “Precise geolocation data” means personal data that accurately identifies within a radius of 1,850 feet a consumer’s present or past location or the present or past location of a device that links or is linkable to a consumer or any data that is derived from a device that is used or intended to be used to locate a consumer within a radius of 1,850 feet by means of technology that includes a global positioning system that provides latitude and longitude coordinates.</p>	<p>(27) "Precise geolocation data" means information derived from technology, including, but not limited to, global positioning system level latitude and longitude coordinates or other mechanisms, that directly identifies the specific location of an individual with precision and accuracy within a radius of one thousand seven hundred fifty feet.</p> <p>"Precise geolocation data" does not include</p>	<p>Same as CT.</p>	<p>Same as CT.</p>	<p>In “Sensitive Data” definition: “Accurately identifies within a radius of 1,750 feet a consumer’s present or past location, or the present or past location of a device that links or is linkable to a consumer by means of technology that includes, but is not limited to, a global positioning system that provides latitude and longitude coordinates”</p>	<p>The way this definition is constructed – totally different from all other definitions in state comprehensive laws – the definition could include things like billing or shipping information. The point of the data element is to let consumers know – and give them control over – businesses that are tracking their individual locations. This would again create consumer confusion, and would also require opt-in consent any time a consumer enters their address, which could be</p>

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<p>(B) “Precise geolocation data” does not include the content of communications or any data generated by or connected to advanced utility metering infrastructure systems or equipment for use by a utility. § 2415(32)(A)-(B).</p>	<p>the content of communications or any data generated by or connected to advanced utility metering infrastructure systems or equipment for use by a utility. <u>Conn. Gen. Stat. § 42-515(27) (2023).</u></p>				<p>cumbersome and inconvenient for the consumer.</p> <p>Additionally, things like communications in text messages saying “I’m here” or “had a great time last night at the Three Penny” would be classified as precise geolocation, when again, that is not the processing that’s happening.</p> <p>The accepted definition across all states is one that derives from the Washington Privacy Act, which was developed through an extensive, multi-year stakeholder process.</p>
<p>(43)(A) “Sale of personal data” means the sale, rent, release, disclosure, dissemination, provision, transfer, or other communication, whether oral, in writing, or by electronic or other means, of a consumer’s personal data by the controller to a third party for monetary or other valuable consideration or otherwise for a commercial purpose.</p> <p>(B) For purposes of this subdivision (43), “commercial</p>	<p>(37) "Sale of personal data" means the exchange of personal data for monetary or other valuable consideration by the controller to a third party.</p> <p>"Sale of personal data" does not include:</p> <ul style="list-style-type: none"> (A) the disclosure of personal data to a processor that processes the 	<p>Same as CT.</p>	<p>Same as CT.</p>	<p>Same as CT.</p>	<p>The definition of “sale” includes the phrase “or other valuable consideration,” which means that it covers all manner of transfers and sharing short of giving away data for free.</p> <p>This kind of broad, CA-style definition attempts to classify even oral communications as a “sale” – not something that is easy for compliance or for consumers to understand.</p>

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<p>purpose” means to advance a person’s commercial or economic interests, such as by inducing another person to buy, rent, lease, join, subscribe to, provide, or exchange products, goods, property, information, or services, or enabling or effecting, directly or indirectly, a commercial transaction.</p> <p>(C) “Sale of personal data” does not include:</p> <ul style="list-style-type: none"> • (i) the disclosure of personal data to a processor that processes the personal data on behalf of the controller; • (ii) the disclosure of personal data to a third party for purposes of providing a product or service requested by the consumer; • (iii) the disclosure or transfer of personal data to an affiliate of the controller; • (iv) the disclosure of personal data where the consumer directs the controller to disclose the personal 	<p>personal data on behalf of the controller,</p> <ul style="list-style-type: none"> • (B) the disclosure of personal data to a third party for purposes of providing a product or service requested by the consumer, • (C) the disclosure or transfer of personal data to an affiliate of the controller, • (D) the disclosure of personal data where the consumer directs the controller to disclose the personal data or intentionally uses the controller to interact with a third party, • (E) the disclosure of personal data 				<p>Moreover, consumers will be told that businesses are “selling” their data when in fact they’re doing nothing of the sort.</p> <p>Again, this will lead to consumer confusion. The definition in the other states referenced here strikes the right balance between what can be described as a “sale” and what is not.</p>

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<p>data or intentionally uses the controller to interact with a third party;</p> <ul style="list-style-type: none"> • (v) the disclosure of personal data that the consumer: <ul style="list-style-type: none"> • (I) intentionally made available to the general public via a channel of mass media; and • (II) did not restrict to a specific audience; or • (vi) the disclosure or transfer of personal data to a third party as an asset that is part of a merger, acquisition, bankruptcy or other transaction, or a proposed merger, acquisition, bankruptcy, or other transaction, in which the third party assumes control of all or part of the controller’s assets. <u>§ 2415(43)(A)-(C); § 2415(43)(C)(i)-(vi).</u> 	<p>that the consumer</p> <ul style="list-style-type: none"> • (i) intentionally made available to the general public via a channel of mass media, and • (ii) did not restrict to a specific audience, or • (F) the disclosure or transfer of personal data to a third party as an asset that is part of a merger, acquisition, bankruptcy or other transaction, or a proposed merger, acquisition, bankruptcy or other transaction, in which the third party assumes control of all or part of the 				

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	controller's assets.				
<p>(45)(A) “Targeted advertising” means:</p> <ul style="list-style-type: none"> • (i) except as provided in subdivision (ii) of this subdivision (45)(A), the targeting of an advertisement to a consumer based on the consumer’s activity with one or more businesses, distinctly branded websites, applications, or services, other than the controller, distinctly branded website, application, or service with which the consumer is intentionally interacting; and • (ii) as used in section 2420 of this title, the targeting of an advertisement to a minor based on the minor’s activity with one or more businesses, distinctly-branded websites, applications, or services, including with 	<p>(39) “Targeted advertising” means displaying advertisements to a consumer where the advertisement is selected based on personal data obtained or inferred from that consumer's activities over time and across nonaffiliated Internet web sites or online applications to predict such consumer's preferences or interests.</p> <p>“Targeted advertising” does not include:</p> <ul style="list-style-type: none"> • (A) advertisements based on activities within a controller's own Internet web sites or online applications, • (B) advertisements based on the context of a consumer's current search 	Same as CT.	Same as CT.	Same as CT	<p>This definition is universal among the 100M consumers covered by the Washington Privacy Act-style framework (what has evolved into the CT framework).</p> <p>The proposed definition in H.121 is confusing because it’s not clear what different activities it’s trying to get at that the accepted definition does not.</p> <p>Additionally, if companies are required to distinguish between activities on their own site between minors and adults, it can easily turn into a compliance incentive to collect more, not less, data on website visitors to segregate those visitors to whom no first-party advertising can be served.</p> <p>Lastly, this would likely make it more difficult for VT businesses to serve their own VT customers than it would to serve customers in neighboring states – surely not a positive outcome of this legislation.</p>

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<p style="color: red;">the controller, distinctly branded website, application, or service with which the minor is intentionally interacting.</p> <p><u>§2415(45)(A)(i)-(ii).</u></p> <p>(B) “Targeted advertising” does not include:</p> <ul style="list-style-type: none"> • (i) for targeted advertising to a consumer other than a minor, an advertisement based on activities within a controller’s own commonly-branded website or online application; • (ii) an advertisement based on the context of a consumer’s current search query, visit to a website, or use of an online application; • (iii) an advertisement directed to a consumer in response to the consumer’s request for information or feedback; or • (iv) processing personal data solely to 	<p>query, visit to an Internet web site or online application,</p> <ul style="list-style-type: none"> • (C) advertisements directed to a consumer in response to the consumer’s request for information or feedback, or • (D) processing personal data solely to measure or report advertising frequency, performance or reach. <u>Conn. Gen. Stat. § 42-515(39)(A)-(D).</u> 				

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measure or report advertising frequency, performance, or reach. §2415(45)(B)(i)-(iv).					
<p>Loyalty Programs:]Subsections (a) and (b) of this section shall not be construed to:</p> <ul style="list-style-type: none"> • (1) require a controller to provide a good or service that requires personal data from a consumer that the controller does not collect or maintain; or • (2) prohibit a controller from offering a different price, rate, level of quality, or selection of goods or services to a consumer, including an offer for no fee or charge, in connection with a consumer's voluntary participation in a financial incentive program, such as a bona fide loyalty, rewards, premium features, discount, or club card program, provided that the controller may not 	<p>Loyalty Programs: (B) If a consumer's decision to opt out of any processing of the consumer's personal data for the purposes of targeted advertising, or any sale of such personal data, through an opt-out preference signal sent in accordance with the provisions of subparagraph (A) of this subdivision conflicts with the consumer's existing controller-specific privacy setting or voluntary participation in a controller's bona fide loyalty, rewards, premium features, discounts or club card program, the controller shall comply with such consumer's opt-out preference signal but may notify such consumer of such conflict and provide to such consumer the choice to confirm such controller-</p>	Same as CT.	Same as CT.	Same as CT	Adding additional requirements on loyalty programs for Vermonters will make it harder for VT businesses to offer and service them. Loyalty programs are extremely popular with consumers, and creating additional friction with them for programs they want is unnecessary. Similar to targeted advertising, it will make it more difficult for a VT business to offer loyalty programs in VT than in NH.

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<p>transfer personal data to a third party as part of the program unless:</p> <p>(A) the transfer is necessary to enable the third party to provide a benefit to which the consumer is entitled; or</p> <p>(B)(i) the terms of the program clearly disclose that personal data will be transferred to the third party or to a category of third parties of which the third party belongs; and (ii) the consumer consents to the transfer. <u>§2419(c)(1)-(2); §2419(A)-(B).</u></p>	<p>specific privacy setting or participation in such program. <u>Conn. Gen. Stat. § 42-520(b) (2023).</u></p> <p>(b) Nothing in subsection (a) of this section shall be construed to require a controller to provide a product or service that requires the personal data of a consumer which the controller does not collect or maintain, or prohibit a controller from offering a different price, rate, level, quality or selection of goods or services to a consumer, including offering goods or services for no fee, if the offering is in connection with a consumer's voluntary participation in a bona fide loyalty, rewards, premium features, discounts or club card program. <u>Conn. Gen. Stat. § 42-520(b) (2023).</u></p>				

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<p>Private Right of Action: (a)(1) A person who violates this chapter or rules adopted pursuant to this chapter commits an unfair and deceptive act in commerce in violation of section 2453 of this title. <u>§2427(a)(1).</u></p> <p>(2) A consumer harmed by a violation of this chapter or rules adopted pursuant to this chapter may bring an action in Superior Court for the greater of \$1,000.00 or actual damages, injunctive relief, punitive damages in the case of an intentional violation, and reasonable costs and attorney’s fees if the consumer has notified the controller or processor of the violation and the controller or processor fails to cure the violation within 60 days following receipt of the notice of violation. <u>§2427(a)(2).</u></p>	<ul style="list-style-type: none"> • No PRA • Exclusive AG Enforcement • Right to Cure (18 month sunset) 	<p>Same as CT (but 12 month, not 18 month, Right to Cure)</p>	<p>Same as CT.</p>	<p>Same as CT.</p>	<p><i>No state has a private right of action for comprehensive privacy violations.</i></p> <p><i>Studies have shown that in class action lawsuits, the entities reaping the benefits of settlements are trial lawyers, not consumers.</i></p> <p><i>Simply put: a PRA will hurt Vermont because trial lawyers do not care about “advancing the law” – they are motivated by the economics of filing a lawsuit and forcing the company to settle for less than what it would take to get to a Motion to Dismiss.</i></p> <p><i>A PRA will be deleterious for the VT business environment without any meaningful benefit to consumers.</i></p> <p><i>Notably, in the CT AG’s recent enforcement report, there was no recommendation to abandon AG enforcement.</i></p>

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