



March 3, 2023

Chair Michael Marcotte
Vice Chair Stephanie Jerome
Committee on Commerce and Economic Development
Vermont House of Representatives
115 State Street, Room 35
Montpelier, VT 05633-5301

Re: H. 121, Vermont Consumer Privacy Legislation - SUPPORT IF AMENDED

Dear Chair Marcotte, Vice Chair Jerome, and Members of the House Commerce and Economic Development Committee,

Consumer Reports¹ sincerely thanks you for your work to advance consumer privacy in Vermont. H. 121 would extend to Vermont consumers important new protections, including by providing the ability for consumers to opt out from targeted advertising, predictive analytics, tracking, or the sale of personal information through a universal opt out mechanism.

While H. 121 also includes a number of other elements that we generally support, including adding data broker registration, security breach notification, and opt out requirements, as well as biometric privacy protections, we focus our comments on the comprehensive privacy protections included in the bill. We plan to add more detailed commentary at a later date.

Consumers currently possess very limited power to protect their personal information in the digital economy, while online businesses operate with virtually no limitations as to how they process that information (so long as they note their behavior somewhere in their privacy policy). As a result, consumers' every move is constantly tracked and often combined with offline activities to provide detailed insights into their most personal characteristics, including health conditions, political affiliations, and sexual preferences. This information is sold as a matter of course, is used to deliver targeted advertising, facilitates differential pricing, and enables opaque algorithmic scoring—all of which can lead to disparate outcomes along racial and ethnic lines.

¹ Founded in 1936, Consumer Reports (CR) is an independent, nonprofit and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR advocates for laws and company practices that put consumers first. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today's consumers, and provides ad-free content and tools to 6 million members across the U.S.

At the same time, spending time online has become integral to modern life, with many individuals required to sign-up for accounts with tech companies because of school, work, or simply out of a desire to connect with distant family and friends. Consumers are offered the illusory “choice” to consent to company data processing activities, but in reality this is an all or nothing decision; if you do not approve of any one of a company’s practices, you can either forgo the service altogether or acquiesce completely.

Strong data minimization provisions are the key to privacy legislation in our view because they prevent consumers from constantly operating from a defensive position where they must determine whether each company that they interact with performs processing activities they consider acceptable or not. While Section 2432 (b) of the bill provides that collection, use, retention and sharing of personal information “shall be reasonably necessary and proportionate to achieve the purposes for which the personal information was collected,” it contains a second clause that significantly weakens the effect of the language. Businesses may also use such information for “another disclosed purpose that is compatible with the context in which the personal data was collected.” This allows businesses to detail an exhaustive list of data processing activities in their privacy policy that differ from the processing the consumer actually requested, but which would be permitted so long as the business can argue that they are “compatible,” a term left undefined in the text. California’s CPRA currently includes similar language, though this provision has yet to be tested in court and it is unclear how broadly it will be interpreted. The drafters should strike everything after “processed” on page eleven, line four in the current draft.

That said, privacy legislation with universal opt-outs (like H. 121) also empowers consumers by making it easier to manage the otherwise untenably complicated ecosystem of privacy notices, opt-out requests, and verification.² The goal of universal opt-out is to create an environment where consumers can set their preference once and feel confident that businesses will honor their choices as if they contacted each business individually.

Measures largely based on an opt-out model with no universal opt-out, like the original interpretation of the California Consumer Privacy Act (CCPA), would require consumers to contact hundreds, if not thousands, of different companies in order to fully protect their privacy. Making matters worse, Consumer Reports has documented that some companies’ opt-out processes are so onerous that they have the effect of preventing consumers from stopping the sale of their information.³

Section 2432 (e) of the bill requires that covered businesses and data brokers allow consumers to opt-out from a controller’s processing of personal data for the purpose of targeted advertising,

² Aleecia M. McDonald and Lorrie Faith Cranor, “The Cost of Reading Privacy Policies,” *I/S: A Journal of Law and Policy for the Information Society*, vol. 4, no. 3 (2008), 543-568.

https://kb.osu.edu/bitstream/handle/1811/72839/ISJLP_V4N3_543.pdf?sequence=1&isAllowed=y

³ Maureen Mahoney, California Consumer Privacy Act: Are Consumers’ Rights Protected, *CONSUMER REPORTS* (Oct. 1, 2020),

https://advocacy.consumerreports.org/wp-content/uploads/2020/09/CR_CCPA-Are-ConsumersDigital-Rights-Protected_092020_vf.pdf.

predictive analytics, tracking, and sales using a universal opt out mechanism. Privacy researchers, advocates, and publishers have already created multiple technologies that would fit the bill for a universal opt-out mechanism under this draft, including the Global Privacy Control (GPC)⁴, which could help make the opt-out model more workable for consumers.

However, the legislation still lacks a number of key definitions that could hinder its overall effectiveness. There are also several potential loopholes data collectors could exploit to evade the consumer protections envisaged by the bill. We offer several suggestions, based on our Model State Privacy Act,⁵ to strengthen the bill to provide the level of protection that Vermonters deserve.

- *Ensure targeted advertising, tracking, and predictive analytics are adequately covered.* While we appreciate that this measure has an opt out for targeted advertising, tracking, and predictive analytics, those terms are currently undefined. This ambiguity could allow internet giants like Google, Facebook, and Amazon to construe the terms narrowly to reduce their need to comply. For example, in the case of targeted advertising, tech companies have fought in other states to water down the definition of targeted advertising so that they can continue to serve targeted ads based on their own vast data stores on other websites. We recommend using the following definitions (note, our definition of targeted advertising would also likely encompass “tracking”):

“Targeted advertising” means the targeting of advertisements to a consumer based on the consumer’s activities with one or more businesses, distinctly-branded websites, applications or services, other than the business, distinctly branded website, application, or service with which the consumer intentionally interacts. It does not include advertising: (a) Based on activities within a controller’s own commonly-branded websites or online applications; (b) based on the context of a consumer’s current search query or visit to a website or online application; or (c) to a consumer in response to the consumer’s request for information or feedback.

“Predictive analytics” means any form of automated processing of personal data to evaluate, analyze, or predict personal aspects concerning an identified or identifiable individual’s economic situation, health, personal preferences, interests, reliability, behavior, location, or movements.

- *Add non-discrimination assurances.* Consumers have a fundamental right to privacy, and should not be charged or otherwise penalized for exercising their privacy rights. The current draft allows companies to do just that, potentially undermining the effectiveness

⁴ Global Privacy Control, <https://globalprivacycontrol.org>.

⁵ Consumer Reports, Model State Privacy Act, (Feb. 2021), https://advocacy.consumerreports.org/wp-content/uploads/2021/02/CR_Model-State-Privacy-Act_022321_vf.pdf

of the entire act. As outlined in our model bill, privacy legislation should strictly prohibit companies from offering a different price based on whether or not a consumer has opted out of the sale of their information. We recommend the following language:

(a) A business shall not discriminate against a consumer because the consumer exercised any of the consumer's rights under this title, or did not agree to information processing

for a separate product or service, including, but not limited to, by:

(1) Denying goods or services to the consumer.

(2) Charging different prices or rates for goods or services, including through the use of discounts or other benefits or imposing penalties.

(3) Providing a different level or quality of goods or services to the consumer.

(4) Suggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services.

(5) This title shall not be construed to prohibit a business from offering discounted or free goods or services to a consumer if the offering is in connection with a consumer's voluntary participation in a program that rewards consumers for repeated patronage, if personal information is used only to track purchases for loyalty rewards, and the business does not share the consumer's data with third parties pursuant to that program.

- *Add a private right of action.* Given the AG's limited resources, a private right of action is key to incentivizing companies to comply. If businesses recognize that the AG is only capable of bringing a handful of enforcement actions each year, some might simply ignore the law and take their chances in evading detection. Further, it's appropriate that consumers are able to hold companies accountable in some way for violating their rights.
- *Include strong civil rights protections.* A key harm observed in the digital marketplace today is the disparate impact that can occur through processing of personal data for the purpose of creating granularized profiles of individuals based off of data both collected and inferred about them. Therefore a crucial piece of strong privacy legislation is ensuring that a business' processing of personal data does not discriminate against or otherwise makes opportunity or public accommodation unavailable on the basis of protected classes. A number of privacy bills introduced federally in recent years have included such civil rights protections, including the American Data Privacy and Protection Act which overwhelmingly passed the House Energy and Commerce Committee on a 53-2 bipartisan vote.⁶ Consumer Reports' Model State Privacy Legislation also contains

⁶ See Section 2076, Amendment in the Nature of a Substitute to the American Data Privacy and Protection Act, <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

specific language prohibiting the use of personal information to discriminate against consumers.⁷

Thank you again for your consideration, and for your work on this legislation. We look forward to working with you to ensure that Vermont residents have the strongest possible privacy protections.

Sincerely,
Matt Schwartz
Policy Analyst

⁷ See Sections 125 and 126, Consumer Reports, Model State Privacy Act, (Feb. 2021)
https://advocacy.consumerreports.org/wp-content/uploads/2021/02/CR_Model-State-Privacy-Act_022321_vf.pdf