September 24, 2021

Representative Steve Elkins
515 State Office Building
St. Paul, MN 55155
ATTN: Committee Administrator Adeline Miller

RE: Comment on Minnesota HF 1492

Dear Representative Elkins:

On behalf of the advertising industry, we provide the following initial, but not exhaustive comments on HF 1492.[1] We look forward to working with you and members of the legislature on the proposed legislation.

We share the Minnesota legislature's interest in harmonizing state law privacy standards so consumers have consistent privacy rights and businesses are able to take a more holistic approach to privacy law compliance. We therefore encourage the legislature to work to align HF 1492 with recently enacted privacy legislation in other states, such as the Virginia Consumer Data Protection Act.[2] In line with other state privacy laws, we also strongly urge the legislature to retain the state Attorney General enforcement structure that is presently set forth in HF 1492, as private rights of action do not adequately protect consumers or provide clear rules for businesses. Finally, we ask the legislature to reconsider the broad opt-in consent requirements in the bill, which would limit Minnesotans from receiving the benefits of vital uses of data, and clarify certain bill definitions in order to promote consistency and clarity for consumers and businesses alike.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies, from small businesses, to household brands, advertising agencies, and technology providers, including a significant number of Minnesota businesses. Our combined membership includes more than 2,500 companies, is responsible for more than 85 percent of U.S. advertising spend. Through robust self-regulatory bodies and strong industry-imposed standards, our members engage in responsible data collection and use that benefits consumers and the economy, and we believe consumers deserve consistent and enforceable privacy protections in the marketplace.

I. A Private Right of Action Would Be an Ineffective Form of Enforcement

As presently drafted, HF 1492 vests enforcement in the Minnesota Attorney General ("AG").[3] We encourage legislators to retain this approach because such an enforcement structure would lead to strong outcomes for Minnesotans 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

[1] Minn. HF 1492 (2021), located here (hereinafter "HF 1492").
[2] *See* Virginia Consumer Data Protection Act, §§ Va. Code Ann. 59.1-571 et seq., located here.
[3] HF 1492 at Sec. 10.

both Minnesotan consumers and businesses. This AG enforcement structure, coupled with a reasonable cure period, helps to keep businesses who have tried in good faith to comply with new privacy requirements out of the courts, thereby preserving judicial resources and minimizing litigation costs.

A private right of action would create a complex and flawed compliance system without tangible privacy benefits for Minnesotans. Allowing private actions would flood the state's courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations of the law rather than focusing on actual consumer harm. A study of 3,121 private actions under the Telephone Consumer Protection Act ("TCPA") occurring over a 17-month timespan after the Federal Communications Commission issued a ruling that opened the floodgates of TCPA litigation showed that approximately 60 percent of TCPA lawsuits were brought by just forty-four law firms.[4] Private actions thus create an environment that enriches a select few attorneys while providing only nominal benefits for consumers with viable claims. Moreover, the same TCPA study found that private rights of action tend to attract repeat plaintiffs. Plaintiffs looking to take advantage of private action regimes strain judicial resources and exact penalties from businesses for technical violations of law that may not equate to any quantifiable harms on consumers.

Even entirely meritorious private claims against companies for legal violations that impact multiple consumers rarely result in material compensation to individuals as redress. Class action settlement amounts, for example, are usually underwhelming from the individual consumer's perspective. To make the point: under a truth-in-advertising labeling legal regime that allowed a private right of action in a lawsuit targeting a well-known food manufacturing company, lawyers pocketed millions—an amount equal to $2,100 per hour they spent on the case.[5] Their clients, on the other hand, took home a mere $15 per consumer *at most*—a fraction of the amount their attorneys received.[6] The result is similar in TCPA litigation, as individuals often walk away with a minimal portion of a settlement fund that pays out to class members pro rata, while 25 to 30 percent of that fund goes directly to class counsel.[7] Amounts paid out to consumers have proven to be insignificant, even though only 4 to 8 percent of eligible claim members make themselves available for compensation from settlement funds.[8] Private rights of action therefore unjustly enrich attorneys without offering proportionate, tangible benefits or meaningful recompense to consumers.

Additionally, a private right of action would have a chilling effect on Minnesota's economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of the law. Private rights of action can drive companies to settle cases to avoid excessive litigations costs despite plausible arguments they may have to support their defense. Small, startup, and mid-size firms are particularly vulnerable to the threat of litigation and

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[4] U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* 2, 4, 11-15 (Aug. 2017), located at https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf; *see also In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961 (2015).

[5] American Tort Reform Foundation, *State Consumer Protection Laws Unhinged: It's Time to Restore Sanity to the Litigation* 4 (2003), located at http://www.atra.org/wp-content/uploads/2016/12/WP_2013_Final_Ver0115.pdf. (hereinafter, "ATR Report").

[6] *Id*.

[7] U.S. Chamber Institute for Legal Reform, *Ill-Suited: Private Rights of Action and Privacy Claims* 7-8 (Jul. 2019), located at https://www.instituteforlegalreform.com/uploads/sites/1/Ill-Suited_-_Private_Rights_of_Action_and_Privacy_Claims_Report.pdf.

[8] *Id*.

premature settlements. One notable example is a suit brought against a consumer's local dry cleaner for $54 million, claiming that the store did not abide by its "Satisfaction Guaranteed" promise when it failed to return a man's pants. After a hard-fought, three-year legal battle, the dry cleaner went out of business due to expenses associated with defending the suit. Outcomes such as these provide little benefit to consumers on the whole, threaten the viability of honest, well-meaning businesses, and do not support the development of consistent, enforceable standards.

Beyond the staggering cost to Minnesota businesses a private right of action would create, 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. As a result, including a private right of action in HF 1492 would make Minnesota unfriendly to consumers and businesses alike. We therefore encourage legislators to maintain the AG enforcement structure of the bill and resist efforts to add a private right of action.

II. Broad Opt-In Consent Requirements Impede Consumers From Receiving Critical, Relevant Information and Messages

The data-driven and ad-supported online ecosystem benefits consumers and fuels economic growth and competition. Companies, nonprofits, and government agencies alike use data to target specific messaging to varying groups of individuals. Targeted messaging provides immense public benefit by reaching individual consumers with information that is relevant to them in the right time and place. Legal requirements that limit entities' ability to use data responsibly to reach consumers with important and pertinent messaging can have unintended consequences and, ultimately, serve as a detriment to consumers' health and welfare.

For example, HB 1492 as presently written could undermine public health efforts to ensure information about the COVID-19 pandemic and vaccines are accessible to all Minnesotans. Controllers' ability to process key demographic data enables them to identify at-risk groups and reach out to these communities with crucial information about the coronavirus as well as information regarding who can receive vaccines at particular locations and particular times. Targeted messaging sent to various communities based on characteristics listed in the "sensitive data" definition have worked to encourage members of hard to reach communities to receive COVID-19 vaccinations.[9]

Examples of the use of targeted messaging encouraging vaccines by both public and private entities are everywhere. The Department of Health and Human Services ("DHHS") uses targeted advertising to reach individual communities with information about the vaccine in a way that is relevant and meaningful to them; DHHS is using information in HF 1492's "sensitive data" definition to tailor messaging to individuals in the Native American community by showing images and symbols of Native American culture in the digital advertisements directed to those populations.[10] This kind of specific, targeted messaging to combat coronavirus is just one example of how demographic data is used to benefit consumers and the public at-large. In fact, the same ad-technology systems and processes that enable such COVID-19-related public health messaging also

[9] *See* Jeremy B. Merrill and Drew Harwell, *Telling conservatives it's a shot to 'restore our freedoms': How online ads are promoting coronavirus vaccination*, WASHINGTON POST (Aug. 24, 2021), located here.
[10] *Id*.

enable retailers to reach consumers, allow timely wildfire warnings to reach local communities, and facilitate the dissemination of missing children alerts, among myriad other beneficial uses.[11]

In accordance with responsible data use, uses of data for targeted advertising should be subject to notice requirements and effective user controls. Legal requirements should focus on prohibiting discriminatory uses of such data and other uses that could endanger the health or welfare of consumers instead of placing blanket opt-in consent requirements on uses of data. One-size-fits-all opt in requirements for data uses run the risk of regulating out of existence beneficial uses of information that help consumers, businesses, and non-profits by making messaging and information more relevant to them. To ensure uses of demographic data to benefit Minnesotans can persist, we suggest that the legislature modify the opt-in requirement to apply to demographic data only in cases where processing results in decisions that produce legal effects concerning a consumer or similarly significant effects concerning a consumer.

III. Minor Clarifications to the Sale and Targeted Advertising Definitions Would Better Serve Consumers and Provide Needed Clarity for Controllers

HF 1492 would provide a Minnesota resident with the right to opt out of "the processing of personal data concerning such consumer for purposes of targeted advertising, the sale of personal data, or profiling in furtherance of decisions that produce legal effects concerning a consumer or similarly significant effects concerning a consumer."[12] However, the bill does not clarify how the definitions of "targeted advertising" and "sale" should apply to essential ad operations, which could create confusion in the marketplace and for consumers when it comes to opt outs.

The term "targeted advertising" under the bill covers "displaying advertisements to a consumer where the advertisement is selected based on personal data obtained from a consumer's activities over time and across nonaffiliated web sites or online applications to predict such consumer's preference or interests."[13] The definition *excludes* certain advertising functionality, like contextual advertising, but does not explicitly exclude essential ad operations that are imperative for the Internet to function. These operations include ad fraud prevention, ad delivery, or measuring or reporting on advertising performance, reach, or frequency. Both Virginia and Colorado's privacy laws have provided a similar exclusion for reporting and measuring uses in their respective laws.[14]

The definition of sale similarly does not provide an explicit exemption for essential ad operations.[15] Sale is defined broadly as "the exchange or processing of personal data by the controller for monetary or other valuable consideration from a third party."[16] It is unclear from this

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[11] *See, e.g.,* Digital Advertising Alliance, *Summit Snapshot: Data 4 Good – The Ad Council, Federation for Internet Alerts Deploy Data for Vital Public Safety Initiatives* (Sept. 1, 2021), located here; Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at $1,400/Year; Annual Value Jumps More Than $200 Since 2016* (Sept. 28, 2020), located here; Digital Advertising Alliance, *Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth $1200/Year, 85 Percent Prefer Ad-Supported Internet to Paid* (May 11, 2016), located here; Digital Advertising Alliance, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), located here.

[12] HF 1492 at Sec. 5, Subd. 1(f).

[13] *Id*. at Sec. 2(u).

[14] *See* Virginia Consumer Data Protection Act, Va. Code Ann § 59.1-571; Colorado Privacy Act, Colo. Rev. Stat. § 6-1-1303(25)(b).

[15] HF 1492 at Sec. 2(r).

[16] *Id*.

definition whether a consumer opt out from sale would cover essential ad operations that involve data exchanges – not for targeted or personalized advertising purposes – but for ad fraud prevention, ad delivery, or measuring or reporting on advertising performance, reach, or frequency.

We respectfully ask you to update the bill's definitions of sale and targeted advertising to clarify that essential ad operations like ad delivery, reporting and fraud prevention are exempt from the definition. We ask you to consider altering the definition of the terms pursuant to our suggested language so they make clear that an opt out would not apply to essential ad operations.

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Thank you for your consideration of these comments. We look forward to working further with you on HF 1492.

Sincerely,

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