STATE PRIVACY & SECURITY COALITION

September 27, 2021

ORAL TESTIMONY OF ANTON VAN SEVENTER
REGARDING HF 1492

Good morning Chair Stephenson,

My name is Anton van Seventer, and I am an attorney with DLA Piper in our Administrative Law practice group. In that capacity, I am counsel to the State Privacy & Security Coalition, which is comprised of 291 major communications, technology, media, payment, and retail companies and six trade associations in these sectors.

First, we commend this Committee and the Minnesota legislature for its work on this bill in recent months. This legislation is important to get right, and we believe the core of HF 1492 Is well-intentioned and could succeed in striking an appropriate balance between clear, robust consumer protections and workable requirements for businesses operating in Minnesota.

Working on compliance with these types of laws that have been adopted in other states, we've had the opportunity to really test out the practical effects of variations in state laws. I emphasize that variations in state laws and vague or unworkable provisions can be extremely costly without materially advancing privacy. In this regard: I believe I can add the most value today by commenting on five of the more important issues I've dealt with in the arena of multi-rights privacy legislation.

First is the importance of aligning at least core provisions with similar state laws. This provides both clarity to consumers and dramatically lowers the burden of compliance for Minnesota businesses.

Second, I'd like to take a minute to provide a perspective on the unintended consequences of including a private right of action.

Third, the language of the definition of "sale" can either clarify a law or lead to widespread confusion as it has in California. It is not in the Virginia law and I urge you not to include that mistake in Minnesota and instead to provide for an opt out for targeted advertising, which addresses the same concern much more clearly.

Fourth, I emphasize that several processor provisions in the Washington state bill now enacted in Colorado that are not in the California or Virginia law could be very problematic in giving controllers the ability to extort concessions from smaller service providers. These should be removed.

Finally, a definition of "dark patterns" in the Washington state bill is vague and totally unworkable. The term has significance because it invalidates consent obtained through dark patterns, but the terms would apply to virtually any online interface.

Consistency with laws in Virginia, California and other states

- Privacy is an important right that needs to be protected, but as a highly technical subject, it is also necessary for consumers to fully understand how to control their personal information. Similarly, structuring these rights in a way that is easy to understand will help Minnesota businesses, particularly those operating in good faith, to come into compliance and better understand their obligations to consumers.

- Toward this end, providing clarity to both businesses and consumers on the structure of these new privacy rights is critical. We earnestly request for everyone's sake to align at least the core provisions of the bill with emerging norms in consumer privacy policy. HF 1492 seeks to grant Minnesota consumers many of the same rights included in other state privacy laws such as Virginia and Colorado anyway, so there is really no upside to the potential misinterpretation and confusion inevitably caused by dramatic departures. This also applies to the need for clear commonsense exemptions, such as for entities and data covered by Gramm-Leach-Bliley and a broad exemption for compliance with the Children's Online Privacy Protection Act. Aligning these provisions is one of the best ways to guarantee that consumers are granted the full slate of controls that the sponsors intend. It would also give businesses, many of which already have experience coming into compliance with similar state laws, a clear roadmap to guaranteeing these rights without needless complexity or undue delay.

- That said, we understand that Minnesota is unique and that legislators here will want to "Minnesota-ize" consumer privacy rights to an extent. We simply advocate that you keep in mind that the closer the major provisions are to what consumers and businesses are already familiar with, the faster and easier providing these rights will be for all involved.

Private Right of Action

- Although we understand the initial appeal of a private right of action, this is an example of a case where, looking back at the California law, the practical realities of enforcement created significant unintended consequences for businesses while also failing spectacularly to help actual consumers in the state. Instead, they primarily benefited those who took advantage of this new opportunity to pursue frivolous lawsuits.

- It is important to understand that PRAs for alleged privacy violations involve highly asymmetrical eDiscovery costs because they give rise to costly and disruptive eDiscovery into business's data operations. The cost to defend non-meritorious cases typically exceeds $500,000 without the plaintiff's bar law firm incurring any material expense. This makes privacy class actions an inviting opportunity for nuisance litigants. For example, a plaintiff lawyer could easily allege a knowing violation of a complex privacy right with the bad faith purpose of extracting a settlement from a defendant forced to settle in order to avoid an expensive and disruptive eDiscovery.

- Furthermore, while we share the Committee's goal of protecting consumers, recent studies have proven that PRAs do little to compensate consumers for privacy intrusions, and that government enforcers, particularly State Attorneys General, are far better equipped both financially and in their understanding of privacy regulation to act in consumers' best interest. Instead, PRAs primarily benefit the plaintiffs' bar, and long-term studies have repeatedly shown that they fail to meaningfully compensate consumers even when a privacy violation has been shown.

- Since no state other than California has decided to go down this road, Minnesota residents will not be missing out on a highly dubious protection that does not exist in the vast majority of jurisdictions pursuing omnibus privacy legislation. Businesses in the state will, however, be able to breathe a sigh of relief from highly burdensome often substance-free lawsuits.

Definition of "Sale"

- The final example of learning from experience here that I'd like to highlight is the definition of sale, and specifically including "or other non-monetary consideration" as well as monetary consideration in the definition. We have one state, California, which has done this, but no others, including Virginia, have followed suit.

- This is primarily because, despite the understandable inclination to include barter-type scenarios under the law, relationships between those who collect personal data and those who process it on their behalf run the gamut of consideration. "Other non-monetary consideration" is an impossibly vague description of the varying commercial relationships between data controllers, processors, and third parties, and has already led to widespread confusion in the California business community around which transactions and even which entities are covered by the law.

- Furthermore, this overbreadth is unnecessary to achieve the consumer rights goals behind the bill. Just as in every other privacy law, the consumer rights and regulations regarding collection, treatment, and disclosure of consumer information can be appropriately applied to a variety of entities—including controllers, processors, and even third parties—depending on their relationship with this data. Furthermore, businesses would still be unable to profit directly off of consumer data without their consent. Creating strong, direct consumer rights and specifying well-tailored requirements for the different buckets of businesses retaining consumer data provides far more clarity than attempting to "reach through" to apply to these entities via a vague definition of sale.

To conclude, we again earnestly congratulate the committee on HF 1492, and look forward to continuing to work towards a clear and well-structured law that guarantees both rights and

workability for Minnesota consumers and businesses, while also avoiding significant unintended consequences. Thank you very much for your time.