ECOMMERCE INNOVATION ALLIANCE

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The Honorable Danilo Burgos
Chairman, House Committee on Consumer Protection, Technology and Utilities
106 Irvis Office Building
P.O. Box 202197
Harrisburg, PA 17120-2197

RE: Technical and Economic Deficiencies of House Bill 1942 (Surveillance Pricing Act)

Dear Chairman Burgos and Members of the Committee:

On behalf of the Ecommerce Innovation Alliance (EIA), a nonprofit trade association representing more than 15,000 U.S.-based ecommerce businesses and technology vendors, I am writing to express our deep concerns regarding House Bill 1942.

The EIA brings the e-commerce industry together to advocate for common sense policies that strengthen the e-commerce ecosystem. Our members care deeply about respecting consumer privacy rights and actively support efforts to ensure consumers are protected from abusive practices and scams. Our members are generally small businesses that operate on tight margins and must comply with an increasingly fractured policy landscape as states move to chart their own course on AI, telemarketing, and privacy regulations. We work to educate legislators and regulators on the real-world impact of regulations and advocate for reforms to correct unintended consequences that threaten small businesses.

While the EIA understands concerns regarding the manner in which algorithmic pricing can lead to abusive or discriminatory practices, the current draft of the "Surveillance Pricing Act" fails to adequately protect the legitimate, non-discriminatory ways in which businesses use data to offer customers a richer and more personalized shopping experience. In response to overwhelming consumer demand and heightened expectations, ecommerce retailers are rapidly moving towards a world of personalization-at-scale, in which consumer data is used to curate more tailored and personalized shopping-related communications, while adhering to state and federal privacy regulations. This approach benefits consumers by ensuring that they receive fewer, low-relevant emails and text messages, while receiving information and promotions that are most relevant to them. We fear that HB 1942 as currently drafted will fundamentally disrupt the ecommerce industry by prohibiting the

fundamental "value exchange" of modern online retail, including the ability for retailers to provide discounts that are tailored to the individual rather than the one-size-fits-all approach of the past.

The Economics of Customer Acquisition

To understand why HB 1942 is so disruptive, one must first look at the economics of the digital marketplace. Between 2013 and 2022, the average Customer Acquisition Cost (CAC) for online brands rose by 222%, increasing from approximately $9 to $29 per customer. This surge is driven by increased competition for digital advertising and platform-level privacy changes that have made it harder to reach new shoppers.

As a result, modern ecommerce merchants typically lose money on every new customer's first transaction. Retailers accept this loss as a "marketing investment" because they are not optimizing for a single sale, but for a long-term relationship. Central to the concept of "retention marketing" is that it is essential to an ecommerce business's survival that they foster long-term relationships with happy customers, rather than trying to make all of their sales to new customers. They incentivize visitors to their website to join their mailing lists by offering a transparent "welcome discount" (e.g., "20% off your first order") in exchange for an email or phone number and the consumer's consent to receive ongoing promotional communications.

Importantly, effective retention marketing is not a once-size-fits-all task. Rather, merchants use data gathered over time about the customer, often including first-party data from two-way communications with the customer, and sophisticated tools to get to know this specific customer's preferences and then to tailor discounts and incentives that speak to those preferences. Data from Boston Research Group shows that not only are four-fifths of customers comfortable with personalized experiences from retailers, but that the majority of consumers now expect it and are demonstrably less likely to patronize merchants who do not cater to their individuality. HB 1942 would fundamentally limit the ability of retailers to offer customers the better, more-personalized experience that they crave.

The Disruption of Customer Lifetime Value (CLTV)

Merchants justify high upfront acquisition costs through the calculation of Customer Lifetime Value (CLTV), which represents the total net profit a company expects from a customer over the duration of their entire relationship. The standard formula for this metric is:

$$CLTV = APV \times AFR \times ACL$$

Where:

- APV = Average Purchase Value.
- AFR = Average Frequency Rate (purchases per year).
- ACL = Average Customer Lifespan.

Section 3(e) of HB 1942 creates a "red alert" for this economic model by mandating that data collected for a discount be used "solely for the purpose of offering or administering" that specific discount and "not be used for any other purpose." By legally requiring a merchant to delete a customer's contact information as soon as the initial coupon is delivered, the bill effectively forces the *ACL* (Customer Lifespan) to a single transaction.

The math is unsustainable: if a merchant cannot engage in retention marketing—which is 5 to 25 times more cost-effective than acquisition—the business model fails. Research shows that a mere 5% increase in customer retention can boost overall profitability by 25% to 95%. HB 1942 eliminates this primary lever for growth.

Moreover, HB 1942 represents a significant departure from established privacy frameworks such as the General Data Protection Regulation (GDPR) in Europe and the California Consumer Privacy Act (CCPA). Both of those landmark regulations rely on the principle of "Transparency and Consent" rather than an outright ban on the subsequent use of data. For example, under GDPR, a business can collect data for a "specific, explicit, and legitimate purpose," but it can also obtain consent for multiple purposes at the same time (e.g., "I consent to receive a discount and I consent to receive future marketing"). These and similar state laws allow consumers to ask businesses to delete their personal information, including shopping history, upon demand. On the other hand, the "sole purpose" mandate in HB 1942's Section 3(e) appears to override the consumer's own ability to consent to a long-term relationship, creating a paternalistic regulatory structure that assumes any data retention for marketing is inherently harmful.

Similarly, the restriction is inconsistent with the Telephone Consumer Protection Act, which has operated for decades on the well-established principle that a consumer is entitled to receive the commercial communications of their choosing and, therefore, has a fundamental right to consent to receive ongoing automated calls and text messages from businesses of their choosing.

The "Uniformity Trap" and Technical Segmentation

EIA also has serious concerns about the overreach of Section 3(d), which requires that any discount be "uniformly offered" to all consumers who meet the eligibility criteria. This requirement would interfere with standard, non-discriminatory practices in online retail.

- **New Visitor Discounts:** In an online environment, a merchant must use a "cookie" or tracking pixel to distinguish a "new visitor" from a "returning visitor" to apply a welcome offer correctly. Section 3(a)(b)(2)(i) seems to recognize the importance of these activities by observing that "signing up for a mailing list," "registering for promotional communications," or "participating in a promotion event," is not "surveillance pricing," but then Section 3(d) requires the discount

to be "uniformly offered" and Section 3(e) restricts the use of the data collected to being used only for "offering or administering the applicable discount, cost-based pricing or loyalty program and shall not be used for any other purpose." This creates a paradox: a business can collect data without engaging in "surveillance pricing" if the data is provided by the consumer for ongoing promotional communications or a mailing list, yet Section 3(e) then prohibits the use of that data for the very types of communications the consumer has asked to receive. Combined, Sections 3(d) and 3(e) would prohibit a business from offering customers any type of personalized shopping experience where their actions, web-browsing history, or purchase history is used to tailor offers to meet their specific interests.

- **High-Intent Shoppers:** Section 3(d) also fails to account for how modern merchants use behavior-based triggers to serve "high-intent" shoppers. Ecommerce algorithms often make real-time micro-decisions based on a visitor's engagement—such as how long they linger on a specific page, whether they have viewed an item multiple times, or if they exhibit "cart abandonment" behaviors. If an algorithm detects a high-intent shopper who is hesitating, it may trigger a limited-time incentive to close the sale. Under Section 3(d), a merchant would be forced to "disclose" these specific actions as eligibility criteria.

  This requirement is problematic for two primary reasons:

  - **Gaming the System:** Disclosing the exact triggers (e.g., "visit this SKU three times to receive 10% off") invites bad actors and savvy shoppers to "game" the system. This forces brands to offer deep discounts to consumers who would have otherwise paid full price, leading to massive revenue loss and reduced brand value.

  - **Trade Secret Protection:** These behavioral algorithms are proprietary "secret sauces" that constitute valuable trade secrets. Forced disclosure would destroy the competitive advantage of small D2C brands that have invested heavily in AI-driven personalization, leading to massive revenue loss and diminished brand value.

- **A/B Testing:** It is common industry practice for merchants to evaluate potential offers and discounts through randomized A/B testing, in which some site visitors receive one offer, while others receive a second, third, or fourth offer. This type of controlled testing serves as a non-discriminatory means of identifying which offer produces the most desirable outcome. The requirement to disclose eligibility criteria in advance and provide the discount uniformly leaves no room for a business to optimize their offers using this non-discriminatory testing practice.

For these reasons, EIA respectfully submits that HB 1942 as currently drafted would infringe on commercial speech as protected by the First Amendment of the United States Constitution. Section 3(d)'s uniformity requirement and Section 3(e)'s restrictions impose content-based restriction by allowing the use of data for a "discount" while banning its use for "any other purpose". These provisions would prohibit common – non-discriminatory practices - in the ecommerce industry that are designed to provide consumers with better, more personalized shopping experiences. Under the *Central Hudson* intermediate scrutiny test applicable to commercial speech, the government must prove that such a restriction is "no more extensive than is necessary." A blanket ban on using a customer's voluntarily provided email or phone number for future, personalized marketing and to provide customized offers—even when the customer has explicitly consented to receive such communications—is not narrowly tailored and would be unconstitutional.

Further, the required disclosures are proprietary trade secrets is problematic. The Supreme Court has long held that the right of freedom of speech includes both the right to speak and the "right to refrain from speaking at all." Consumers have no inherent right to be charged a uniform price for a good or service, provided the merchant's decisions are not based on characteristics that constitute protected classes (i.e., age, race, gender, sexual orientation, national origin, religion). HB 1942's broad sweep and mandatory disclosures are not narrowly tailored to prohibit unlawful discrimination. Therefore, the government's desire to know how a business chooses to offer a discount does not constitute a substantial government interest sufficient to override the constitutional protection of proprietary business speech.

Consumer Harm: Higher Prices and Reduced Choice

Finally, it is important to acknowledge that if HB 1942 is passed as drafted, the ultimate victim will be the Pennsylvania consumer. When a merchant is effectively prohibited from selling to a customer more than once through retention marketing, they have no choice but to recoup the entire $29 acquisition loss in the first sale.

This will lead to:

1. **Increased Costs:** Base prices are likely to rise to cover marketing costs that can no longer be amortized over time.

2. **Loss of Savings:** Merchants will have less incentive to offer new visitors discounts if they are not able to use the data to foster a long-term relationship. Programs like "Subscribe & Save," win-back offers for lapsed shoppers, and abandoned cart discounts—which can save consumers significantly—will be effectively banned.

3. **Less Personal Emails and Text Messages:** Consumers will receive less personalized messages, which will require businesses to send more messages in order to achieve the same sales numbers. This antiquated approach is costly for businesses and annoying to consumers.

EIA would be pleased to work with the committee and other stakeholders to evaluate potential changes to the bill that would not unfairly impede the ability of ecommerce retailers to deliver a more personalized, pro-consumer shopping experience. However, it cannot support HB 1942 as currently drafted.

Sincerely,

G. David Carter
President & CEO
Ecommerce Innovation Alliance