June 4, 2024

The Honorable Kathy Hochul
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

RE: Letter in Opposition to the New York Health Information Privacy Act (A4983D and S158E)

Dear Governor Hochul:

On behalf of the advertising industry, we write to alert you to legislation that, if enacted, would hinder New Yorkers' ability to access services and severely burden the operation of many businesses in the state. We provide this letter to express our non-exhaustive list of concerns about the New York Health Information Privacy Act under A4983D and S158E (collectively, "NYHIPA" or "the bills").[1] Our organizations support the enactment of meaningful privacy protections for New Yorkers. However, as presently drafted, NYHIPA would have far-reaching, unintended, and unfavorable consequences for New York consumers and the business community alike.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. These companies range from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product ("GDP") in 2020. Our group has more than a decade's worth of hands-on experience it can bring to bear on matters related to consumer privacy and controls. We would welcome the opportunity to engage with you further to discuss the issues we catalog in this letter.

I. NYHIPA's Definition of "Regulated Health Information" is Overly Broad

NYHIPA's terms, coupled with its overly broad definition of "regulated health information," could unintentionally impede New Yorkers from receiving useful and relevant information about products and services they may desire. As defined, the term "regulated health information" would include *any information* that could possibly be related—however tangentially—to the health of a consumer.[2] The definition could be interpreted to include basic data points, such as the fact that a consumer purchased non-prescription shampoo at a local grocer, attended a fitness event, or signed up to receive promotional notices about specific clothing or footwear restocks. None of this information is inherently related to health, but NYHIPA's broad definition of "regulated health information" could sweep such information into its ambit.

---

[1] New York A4983D (2024 Sess.), located here; New York S158E (2024 Sess.), located here (collectively hereinafter, "NYHIPA").
[2] *Id.* at § 1100(2).

NYHIPA should be updated to narrow the definition of the term "regulated health information." We recommend that the definition of "regulated health information" be aligned with the majority of states that have passed legislation regulating "consumer health data," such as the definitions of the term in the Nevada and Connecticut laws. In those state laws, "consumer health data" is personal information that is linked or reasonably capable of being linked to a consumer and that "*is used to identify*" the past, present or future health status of the consumer. This definition will help ensure that the definition is cabined to information an entity actually uses to identify a consumer's health status, and that basic data points unrelated to a consumer's actual physical or mental health are not unintentionally swept into the definition of the term.

II. The Bills' "Valid Authorization" Requirements Would Cause Consumer Frustration Without Providing Meaningful Privacy Protections

Additionally, and in part due to the NYHIPA's broad definitions, the requirement to obtain "valid authorization"—a signed consent—every time a regulated entity processes regulated health information would inundate New Yorkers with an overwhelming number of consent requests for basic data processing activities.[3] NYHIPA would permit a regulated entity to process regulated health information without a valid authorization to provide a product or service specifically requested by a consumer, for certain security purposes, to defend legal claims, and for certain internal business operations, but the bills explicitly prohibit processing for "activities related to marketing, advertising, research and development, or providing products or services to third parties" absent valid authorization from the consumer.[4] As a result, NYHIPA valid authorization requirements would significantly hinder the use of data to improve products or services, conduct research for the benefit of consumers, and apprise consumers of relevant offerings that may interest them without obtaining signed consent for such activities. NYHIPA would also require consumer consent to be specific to the processing activity.[5] NYHIPA is consequently likely to result in significant consent fatigue for New Yorkers instead of providing meaningful privacy protections for consumers. NYHIPA's detrimental—and likely unintentional—consequences would hinder consumers from receiving significant benefits associated with routine and essential data practices while simultaneously placing overly burdensome requirements on regulated entities that process any information that could even vaguely be related to health.

III. Requiring Regulated Entities to Pass Consumer Rights Requests to Third Parties Could Conflict with Consumer Preferences

NYHIPA would require regulated entities to pass along deletion and correction requests to third parties and would require any third party that receives notice of such a request to delete all regulated health information associated with the consumer within 30 days of receipt of the request.[6] NYHIPA should not require regulated entities to flow deletion requests through to third parties, because such actions may not align with consumers' wishes. A consumer may desire, for instance,

---

[3] *Id.* at § 1102.
[4] *Id.* at § 1102(1)(b)(ii)(B).
[5] *Id.* at §§ 1102(2)(a)(i), (iv).
[6] *Id.* at §§ 1103(2)(c)(ii), (d).

to delete the regulated health information maintained by a certain regulated entity but may not want other regulated entities—who would be "third parties" under the NYHIPA's terms—to similarly be required to delete regulated health information. Such a requirement could impact products and services the consumer wishes to and expects to receive, as a deletion request served on one entity would be required to be cast to all other entities in the marketplace. The consumer may not intend to or want to serve a deletion request on regulated entities the individual knows, trusts, and wishes to continue to receive messaging from. Requiring deletion requests to be passed to other entities in the marketplace would create detrimental results the individual did not intend, desire, or expect.

IV. NYHIPA's Unlimited Attorney General Rulemaking Authority Would Increase Variation With Other State Privacy Laws.

As drafted, NYHIPA would give the New York Attorney General ("AG") broad authority to "promulgate such rules and regulations as are necessary to effectuate and enforce the provisions of this section."[7] Such authority would exacerbate the inconsistency that already exists amongst state health privacy laws by enabling the AG to issue rules that are out of step with privacy requirements in other states. Harmonization with existing privacy laws is essential for creating an environment where consumers in New York and other states have a consistent set of expectations, while minimizing compliance costs for businesses. Compliance costs associated with divergent privacy laws are significant. To make the point: a regulatory impact assessment of the California Consumer Privacy Act of 2018 ("CCPA") concluded that the initial compliance costs to California firms for the CCPA *alone* would be $55 billion.[8] Additionally, a recent study on a proposed privacy bill in a different state found that the proposal would have generated a direct initial compliance cost of between $6.2 billion to $21 billion, and an ongoing annual compliance cost of between $4.6 billion to $12.7 billion for companies.[9] Other studies confirm the staggering costs associated with different state privacy standards. One report found that state privacy laws could impose out-of-state costs of between $98 billion and $112 billion annually, with costs exceeding $1 trillion dollars over a 10-year period and small businesses shouldering a significant portion of the compliance cost burden.[10] New York should not enact a law that could add to this compliance burden for businesses. The legislature should remove NYHIPA's rulemaking authority, or at the very least take steps to place more limitations on the rulemaking authority to foster more consistency across state regimes.

* * *

---

[7] *Id.* at § 1107(6).

[8] *See* State of California Department of Justice Office of the Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations* at 11 (Aug. 2019), located at https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-isor-appendices.pdf.

[9] *See* Florida Tax Watch, *Who Knows What? An Independent Analysis of the Potential Effects of Consumer Data Privacy Legislation in Florida* at 2 (Oct. 2021), located at https://floridataxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986.

[10] Daniel Castro, Luke Dascoli, and Gillian Diebold, *The Looming Cost of a Patchwork of State Privacy Laws* (Jan. 24, 2022), located at https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws (finding that small businesses would bear approximately $20-23 billion of the out-of-state cost burden associated with state privacy law compliance annually).

We and our members support protecting consumer privacy. We believe, however, that NYHIPA takes an overly broad approach to the collection, use, and disclosure of any data that could possibly be related to or indicative of health. We therefore respectfully ask that you carefully consider these negative impacts if the bills do in fact advance to your desk for review.

Thank you in advance for your consideration of this letter.

Sincerely,

Christopher Oswald
EVP for Law, Ethics & Govt. Relations
Association of National Advertisers
202-296-1883

Alison Pepper
EVP, Government Relations & Sustainability
American Association of Advertising Agencies, 4A's
202-355-4564

Lartease Tiffith
Executive Vice President, Public Policy
Interactive Advertising Bureau
212-380-4700

Clark Rector
Executive VP-Government Affairs
American Advertising Federation
202-898-0089

Lou Mastria, CIPP, CISSP
Executive Director
Digital Advertising Alliance
347-770-0322

CC: Mike Signorelli, Venable LLP
Allie Monticollo, Venable LLP