



**WRITTEN TESTIMONY OF DAVID LEDUC
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**BEFORE THE WASHINGTON STATE LEGISLATURE
SENATE COMMITTEE ON LAW AND JUSTICE**

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H.B. 1155

Washington My Health My Data Act

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I. Introduction

On behalf of the Network Advertising Initiative (“NAI”), thank you for the opportunity to provide feedback on H.B. 1155, the Washington My Health My Data Act. The NAI strongly shares the legislature’s interest in protecting the most sensitive forms of consumer data, particularly in light of the *Dobbs v. Jackson Women’s Health* decision and the implications associated with inappropriate use and disclosure of citizens’ reproductive health data.

However, as currently drafted, the legislation is overly broad due to the construction of various definitions. Generally, by not effectively differentiating between what is a *sensitive* “consumer health data” or constitute *sensitive* “health services,” the bill currently would unnecessarily prevent beneficial uses of consumer data for marketing, advertising, and analytical purposes broadly beyond related health information around which the bill seeks to protect. This written testimony provides our principal recommendations for the Committee to address before advancing this legislation.

II. About the NAI

The NAI is the leading self-regulatory organization dedicated to responsible data collection and use by advertising technology companies engaged in digital advertising. For over 20 years, the NAI has promoted a robust digital advertising industry by maintaining and enforcing the highest voluntary standards for the responsible collection and use of consumer data for Tailored Advertising and Ad Delivery and Reporting. Our nearly 100 member companies range from large multinational corporations to small startups and play an integral role in maintaining the free internet, driving economic growth, and encouraging competition in the marketplace.

NAI members’ business models positively impact consumers by connecting them with content they find most relevant in a privacy-friendly manner. In the health-space, the NAI has promoted the highest voluntary industry standards around the use of sensitive health data. As a result, NAI members play an important role in educating consumers about various medications and treatments that may be relevant to them, and by providing them resources to actively participate in their own healthcare, all while promoting strong privacy practices.

In an effort to address potential harms and retain the availability of the positive use cases associated with geolocation information, the NAI developed a set of Voluntary Enhanced Standards for Precise Location Information Solution Providers (“Standards”) in June 2022.¹ These Standards created restrictions on the use, sale, or transfer of location data correlating to Sensitive Points of Interest, including places tied to religious worship, sensitive healthcare services, military bases, and LGBTQ+ identity.² The Standards also created a set of restrictions on the use, sale, or transfer of Precise Location Information for law enforcement, national security, or bounty-hunting purposes, except as needed to comply with a valid legal obligation.³

¹ See Network Advertising Initiative, NAI Precise Location Information Solution Provider Voluntary Enhanced Standards (2022), <https://thenai.org/wp-content/uploads/2022/06/Precise-Location-Information-Solution-ProviderVoluntary-Enhanced-Standards.pdf>.

² *Id.*

³ *Id.*

In addition, the NAI has also published imprecise location guidance for members, which encourages and provides meaningful parameters on how member companies could render Precise Location Information (PLI) imprecise.⁴ We urge the legislature to consider the approach provided by these Enhanced Standards and the NAI’s various guidance documents for critical amendments to H.B. 1155.

III. The H.B. 1155 Definition of “Consumer Health Data” is Overly Broad, Prohibiting a Wide Range of Legitimate and Valuable Practices That Benefit Consumers; the Legislation Should be Amended to Align with Similar Definitions in Other Recently Enacted State Privacy Laws

The NAI strongly believes that sensitive health data should *never* be used as the basis for targeted advertising without a consumer’s affirmative consent, informed by clear and conspicuous notice.⁵ We also believe this information should be subject to stronger notice and consent requirements generally, as well as heightened processing restrictions.

However, we also recognize that health advertising can be extremely valuable to consumers, particularly when not relating to *sensitive* health data, or when applied to sensitive health data is authorized with their consent. When done in a privacy-protective manner, health advertising has the potential to make consumers aware of new treatments and can be crucial in helping to fill clinical trials, especially for rare conditions like those covered by the Orphan Drug Act.⁶ Indeed, in many cases, health-related targeted advertising is extremely beneficial and plays an important role in connecting consumers with medical treatments, medications, or information they genuinely need or want, as well as the provision of coupons and discounts for medications. Through our advocacy and compliance program efforts, the NAI has been able to successfully strike a balance between privacy protections while retaining the benefits of targeted advertising.

As drafted, the definition of “Consumer Health Data” in H.B. 1155 is far broader than the approaches taken in the comprehensive privacy laws recently enacted across five U.S. states. By including not only all search data regarding health services and supplies, in addition to the use or purchase of medicine, bodily functions, vital signs or symptoms, but also “[a]ny information ... ***that is derived or extrapolated from nonhealth information (such as proxy, derivative, inferred, or emergent data by any means..)***.”⁷ [emphasis added] H.B. 1155 therefore extends beyond the scope of what is required for the meaningful regulation of sensitive health data. As a result, this would prohibit virtually all health-related targeted advertising or analytics based on *any kind of information* such as that which pertains to everyday conditions or medications associated with cold and flu symptoms, dermatology and plenty of other non-sensitive health data – likely stripping consumers of the benefits associated with these practices and creating unhelpful outcomes for both consumers and businesses.

⁴ See Network Advertising Initiative, Guidance for Members: Determining Whether Location is Imprecise (2020), https://thenai.org/wp-content/uploads/2021/07/nai_impreciselocation2-1.pdf.

⁵ See Network Advertising Initiative, 2020 NAI Code of Conduct (2020) § II.C, i.e [hereinafter “NAI Code”], https://www.networkadvertising.org/sites/default/files/nai_code2020.pdf.

⁶ Orphan Drug Act, Pub. L. 97-414 (1983).

⁷ H.B. 1155 § 3(7) (proposed).

The definition in H.B. 1155 also includes “precise location information that could reasonably indicate a consumer’s attempt to acquire or receive *health services or supplies*.” [emphasis added] However, the term “health services or supplies” is not defined in the bill. Instead, the bill specifically defines both “Gender-affirming care services,” and “Reproductive or sexual health information.” Under the current definition, “health services or supplies” would likely broadly relate to all of those provided at a local drug store.

The NAI strongly concurs with the value of defining the types of health services that are highly sensitive and tailoring the key protections in this bill to those services, such as these explicitly defined in the bill. Specifically the definition of “Reproductive or sexual health information” appropriately refers to “precise location information *that could reasonably indicate a consumer’s attempt to acquire or receive reproductive or sexual health services*.” [emphasis added]

The NAI’s Voluntary Enhanced Standards⁸ for the processing and sharing of precise location information associated with sensitive locations, includes reproductive clinics and others where consumers expect and deserve heightened protections is an extremely valuable resource. We urge the legislature to consider this list in effectively defining the breadth of what should be considered a *sensitive* “health care facility.” Additionally, our imprecise location guidance offers helpful tools for defining “geofence” with greater precision, creating a more workable compliance obligation for covered businesses.⁹

NAI Recommendation:

The NAI therefore respectfully requests that H.B. 1155 be amended to tailor the application of “consumer health data” to the types of health data that are sensitive, and in doing so, to define more effectively *sensitive* “health services or supplies” to align with the specific sensitive examples already defined in the bill, such as those which pertain to reproductive health, mental health, and gender affirming—all of which are already referred to in the bill as sensitive health data. In contrast, not all data relating to a person’s physical health, nor all data that could be associated with a person’s health at any level rises to the same level of sensitivity or risk to consumers. Again, the NAI’s Voluntary Enhanced Standards provide a useful reference for the categories we have identified, representing the most specific and highest bar established thus far.

IV. H.B. 1155 Provides for a Private Right of Action, Which Would Be Crippling to Businesses and the Court System Without Benefiting Consumers; H.B. 1155 Should be Amended to Provide Enforcement Vested Solely with the Attorney General

As presently drafted, H.B. 1155 enables private citizens to bring actions against covered entities for violations of the bill. Despite amendments in the Washington State House seeking to narrow the application of the private right of action, this still represents an unprecedented approach as

⁸ Network Advertising Initiative, NAI Precise Location Information Solution Provider Voluntary Enhanced Standards (2022), <https://thenai.org/wp-content/uploads/2022/06/Precise-Location-Information-Solution-ProviderVoluntary-Enhanced-Standards.pdf>.

⁹ See Network Advertising Initiative, Guidance for Members: Determining Whether Location is Imprecise (2020), https://thenai.org/wp-content/uploads/2021/07/nai_impreciselocation2-1.pdf.

compared to other state or federal privacy laws, and it is likely to have a crippling impact on state courts and businesses alike.

Principally, a broad private right of action risks attracting frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations rather than focusing on actual consumer harm or providing tangible privacy benefits for consumers. Further, even when companies are found to be in compliance, the litigation costs of numerous unfounded suits are crippling, particularly for small and medium-sized businesses. What is more, this approach is also likely to flood the state's courts, absorbing valuable state resources that could otherwise be used to advance consumer privacy efforts in other, more productive ways.

The California Privacy Protection Act (CCPA) contains a narrow private right of action, one that does not extend beyond data breach claims, therefore not applying to those relating to other violations of the CCPA, such as the consumer rights related to notice, opt-out deletion, etc. However, an analysis produced by Perkins Coie LLP¹⁰ reveals that a high percentage of cases brought in 2020, approximately two-thirds of those cases, were brought in relation to triggering conduct which fell outside the scope of the law. While the landscape evolved in 2021 such that 90 percent of the actions were appropriately tailored to data breach, still a full 10 percent are actions brought outside the scope, still necessitating those companies to respond with legal motions to dismiss or defend.

Consumer privacy laws are extremely nuanced, and implications often turn on the knowledge and interpretation of the regulatory body charged with enforcing them—this is a stark distinction from the application of data security and breach statutes that are much more technically defined and assessed. Consequently, a private right of action associated with a broader and substantially more ambiguous set of definitions, requirements, and potential harms, such as those proposed by H.B. 1155, is likely to encourage a much larger number of spurious actions, and it is likely that these actions. The spurious actions that could be expected in relation to H.B. 1155 as currently drafted are significantly less likely to be curtailed by the factors at play in relation to the CCPA action, such as court enforcement trends, effective motions to dismiss and other procedural vehicles.

Such an outcome will have a debilitating effect on many businesses who have not even violated the law, rather to the goal of enriching entrepreneurial trial attorneys or seeking to punish specific businesses for various reasons. Therefore, the NAI urges you to amend H.B. 1155 to provide for enforcement of violations exclusively by the Washington Attorney General.

V. Conclusion

The NAI appreciates the opportunity to provide comments on this important legislation, and we would welcome the opportunity to provide further input and discuss specific amendment language to address the concerns highlighted. Thank you in advance for your attention to these recommendations, and please do not hesitate to contact me at david@thenai.org with any questions or to discuss.

¹⁰ See Perkins Coie LLP, California Consumer Privacy Act Litigation: 2021 year in Review (2022), <https://www.perkinscoie.com/images/content/2/5/252535/2022-CCPA-YIR-2021-v2.pdf>