



June 26, 2023

The Honorable John J. Cronin
Chair, Joint Committee on Consumer Protection and Professional Licensure
Massachusetts Senate
24 Beacon St.
Room 218
Boston, MA 02133
John.Cronin@masenate.gov

The Honorable Tackey Chan
Vice Chair, Joint Committee on Consumer Protection and Professional Licensure
Massachusetts House of Representatives
24 Beacon St.
Room 42
Boston, MA 02133
Tackey.Chan@mahouse.gov

RE: ATA Action Comments on Senate Bill 184

Good afternoon Chair Cronin, Chair Chan, and members of the Joint Committee on Consumer Protection and Professional Licensure,

On behalf of the ATA Action, I am providing the following comments on Senate Bill 184.

ATA Action, the American Telemedicine Association's affiliated trade association focused on advocacy, advances policy to ensure all individuals have permanent access to telehealth services across the care continuum. ATA Action recognizes that telehealth and virtual care have the potential to truly transform the health care delivery system – by improving patient outcomes, enhancing safety and effectiveness of care, addressing health disparities, and reducing costs – if only allowed to flourish.

Telehealth is and will remain an important component of how Americans access the healthcare services they need. As more providers come online – figuratively and literally – ATA Action urges increased vigilance by the healthcare community to ensure these practices meet standards for patient safety, data privacy, and information security. Indeed, patient privacy and the protection of patient data are prerequisites for connected care and core principles for our organization. State and federal regulatory schemes should allow for innovation and support the advancement of technology-assisted care; however, telehealth and virtual care platforms, systems, and devices should be required to mitigate cybersecurity risks and provide for patient safety and confidentiality.

ATA Action agrees with the overall intent of SB 184 to ensure appropriate protections for personal health information. However, as currently drafted, we have serious concerns that several provisions in SB 184 (“the Act”) run counter to sound data privacy policy and put undue burdens on healthcare providers due

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to its complexity and undefined breadth. States considering similar legislation during the 2023 legislative cycle—including Illinois, New York, Maryland and Virginia—have instead chosen to delay the adoption of rules specifically covering health data to further consider the impact of this broad reaching language in an evolving policy discussion.

We strongly urge the Committee to model the actions of these other states and reconsider or refine this legislation, since the existing confusion in the current version of the bill ultimately may impede how providers engage with patients – thus potentially lowering access to care for Massachusetts’ most vulnerable communities.

Specifically, ATA Action makes the following recommendations:

Definition of consumer health data is too broad and causes confusion: The bill’s broad definition of “consumer health data” far exceeds the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) definition of “protected health information.” The Act’s definition of “consumer health data” captures a wide range of data, which would include various search and browsing-related activities even when there is no health information being transferred. ATA Action is concerned that providers and other online healthcare entities would be arbitrarily limited in their ability to communicate with current or potential Massachusetts consumers, particularly regarding sensitive health matters such as reliable sexual health information, obtaining over the counter medication, or obtaining supplies. This is especially troubling for stigmatized conditions like sexual health, where online outreach and engagement might be the only way a patient would feel comfortable with treatment. To promote clarity and consistency, ATA Action requests that the definition of consumer health data track the definition of “protected health information” in the HIPAA Privacy Rule. At a minimum, we strongly urge the sponsors to reconsider this definition and ensure it is narrowly tailored to achieve the legislation’s objectives and not unnecessarily restrict access to care.

SB184 includes the nation’s most restrictive prohibition on the sale of data: ATA Action thoroughly agrees that personally identifiable medical information should not be sold by a provider without a patient’s prior written consent, as is the case for HIPAA covered entities. However, SB 184 not only restricts the sale of any information that possibly “relates to” or is “reasonably capable of being associated with” with a consumer (which could easily include non-medical information as noted above) but prohibits the sale of consumer information entirely, even if the provider receives the consumer’s prior written consent. This proposal is far more excessive than both HIPAA regulations as well as the data privacy laws of any other state, and places a heavy burden on those supplying health services in Massachusetts that is not otherwise placed on any other business industry engaging with consumers online and digitally.

A private right of action is inappropriate for enforcing the Act: No other state omnibus consumer data privacy law includes a private right of action, instead recognizing that state attorneys general are more capable of identifying and pursuing bad actors for breaches of such rules. Current comprehensive state privacy laws, like those in California, Utah and Virginia, include a “right to cure” provision allowing providers notice and a set amount of time—typically 30 days—to cure a violation, if possible, prior to any attorney general legal action. These laws recognize that more often than not, providers do intend to keep consumer data secure and desire to do the right thing while navigating a complex landscape of new laws and technologies. Multiple legal commentators have expressed serious concern pairing an overbroad and

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vague definition of health data with a private right of action, since unintentional violation could trigger significant litigation costs for companies.¹

Make clear that HIPAA-covered and HIPAA-compliant entities are exempt from this Act: As currently drafted, SB184 does not wholly exempt entities subject to HIPAA’s rules from the Act’s requirements even when the entity is complying with HIPAA. Instead, Section 8 only exempts HIPAA-covered entities and business associates when they use, collect, or share “protected health information” in compliance with HIPAA. Protected health information under HIPAA, however, is only a subset of what is covered under the extremely broad definition of “consumer health data” under the Act. For example, information such as a patient browsing OTC medication at a retail pharmacy, visiting a landing page of a health system to research its location, and purchase of a health-related book at a hospital bookstore would not be considered protected health information under HIPAA, but would fall under the definition of consumer health data here.

ATA Action recommends that the drafters revise Sec 12 to clearly exempt HIPAA-covered entities and business associates from the provisions of this Act. The current HIPAA rules provide detailed and appropriate protections for the confidentiality of protected health information. Imposing additional, duplicative and potentially inconsistent regulation on these entities would create unnecessary and inappropriate burdens and cost.

ATA Action recognizes there are concerns about the growing number of applications that collect and use healthcare or sensitive data, but are outside of the HIPAA regulatory framework. However, many non-covered entities for HIPAA purposes that operate telehealth services nonetheless voluntarily comply with HIPAA rules in order to ensure safe data handling practices. We recommend the Act consider revising SB 184 to also exempt HIPAA-compliant entities, or as described more below, remove the obligations and requirements in the current Act that exceed – or appear to conflict – with HIPAA.

Restrictions on collection and use of data are inconsistent with and exceed HIPAA, setting up an unequal framework for Massachusetts consumers: Under the proposed Act, a regulated entity would need a specific consent to collect and use a consumer’s data for any purpose other than to provide the product or service that the consumer requested. This would, for example, prohibit a regulated entity from sending communications about additional products or services to the consumer where prior consent is not obtained, even if no personally identifiable medical information is collected. However, a HIPAA-covered entity could engage in that same activity with the consumer’s HIPAA protected health information without any need for consent from the consumer under the HIPAA Privacy Rule. Once again, SB 184 would place a higher burden on providers than HIPAA places on covered entities. We suggest aligning the permitted uses and disclosures of the Act, at a minimum, with the HIPAA Privacy Rule, including that consumer health data may be used for purposes of treatment, payment, and health care operations.

ATA Action hopes that the Committee will embrace these changes so as to simultaneously ensure patient data is effectively protected while not placing undue burdens on providers. We believe that this strikes a fair balance between these two significant public policy goals.

¹ See Washington State Enacts My Health My Data Act, Broadly Regulating Health-Related Data With a Private Right of Action ([here](#)), Washington State Imposes Far-Reaching Privacy Obligations for Consumer Health Data([here](#))



Thank you for your support of telehealth. We encourage you and your colleagues to consider amendments to SB 184 to ensure easy and efficient access to high-quality health care services in Massachusetts. Please do not hesitate to let us know how we can be helpful to your efforts to advance common-sense telemedicine policy. If you have any questions or would like to discuss the telemedicine industry's perspective further, please contact me at kzebley@ataaction.org.

Kind regards,

A handwritten signature in black ink, appearing to read "Kyle Zebley", is written over a faint, light-colored circular watermark or background.

Kyle Zebley
Executive Director
ATA Action