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SIIA Written Testimony on Massachusetts S.227

We are writing to express the Software & Information Industry Association's (SIIA's) concerns with the current draft of S.227, the Massachusetts Information Privacy and Security Act (MIPSA). By way of background, SIIA is a trade association representing nearly 400 companies across the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information; creators of software and platforms used by millions worldwide; and companies specializing in data analytics and information services. Our mission is to protect the three prongs of a healthy information environment essential to that business: creation, dissemination and productive use.

We appreciate the intent of sponsors to enact policies that protect Massachusetts residents. However, we are concerned that MIPSA's current definitions create structural problems throughout the bill and would lead to consumer confusion. The bill also departs from existing norms in the US and imports vague principles from the GDPR, while conversely lacking key exemptions. These concerns are compounded by plenary rulemaking authority granted to the attorney general, as well as a private right of action (PRA) – both of which will needlessly harm businesses operating in Massachusetts without a corresponding benefit to consumers.

First, MIPSA's definitions create significant structural problems and would create widespread confusion among businesses and consumers in Massachusetts regarding the scope of its consumer rights. For example, the definition of "sale" is deeply confusing. It specifically includes targeted cross-contextual advertising, which then wraps in targeted advertising to every provision in the bill that refers to "sale." This even includes provisions such as the "sale" trigger in the risk assessments – any targeted ad would then trigger this requirement. It is also unnecessary in a bill that already addresses advertising. A separate definition of "targeted cross-contextual advertising" worsens this problem, since it focuses on a consumer's intentional interaction, which as written arguably covers advertising on a site that a consumer loaded to view non-advertising content.

MIPSA also departs from other state privacy laws by including separate definitions for "targeted cross-contextual advertising" and "targeted first-party advertising." The latter definition is meant as a carveout, but is so narrow it would not even cover first-party retargeting. "Personal information" covers all information that is "reasonably capable of being associated with" or even simply "relates to" or "describes" a consumer or household, even if that consumer or household is not truly identifiable. This

overbroad, unnecessary scope of covered data does not enhance consumers privacy protections because it covers data unrelated to privacy rights. The inclusion of "devices" is similarly unnecessary, as the focus of the bill is the collection, maintenance and use of data, not devices.

Furthermore, MIPSA departs from emerging norms in US privacy law by including several presumptively nonpermissive and vague data processing, minimization and maintenance principles from the GDPR designed to function as requirements, which would seemingly exist on top of the bill's substantive requirements and cause widespread confusion. These exist in no other US state privacy law and would therefore cause needless compliance challenges for businesses operating in Massachusetts. This is made worse by the bill's failure to fully exempt key societally beneficial uses such as research, which would now be subject to both MIPSA's substantive requirements as well as these data processing standards. This would significantly harm innovation that involves the use of personal data.

This confusion would be compounded since the bill, as drafted, creates plenary rulemaking authority for the Attorney General. Like in California, this would create a "moving target" for businesses attempting to comply in good faith, since the fundamental requirements of the law could change in the future and with no guarantee of a sufficient period to come into compliance with the changed requirements. This is because MIPSA requires the Attorney General to adopt rules and regulations to "implement, administer and enforce" the bill. This effectively creates plenary *and* ongoing rulemaking authority. Continuous rulemaking would dramatically increase compliance costs with little privacy benefit to consumers, as businesses would be forced to continuously adapt to an ever-expanding set of rules and regulations. It would also delay effective compliance and hamstring the bill's intent by preventing businesses from confidently implementing existing protocols in Massachusetts, since they may no longer be compliant in the foreseeable future.

Finally, the bill includes a private right of action, which studies and recent experience have shown becomes a tool to harass businesses, not benefit consumers. Even without a violation, the provision guarantees that nuisance litigants will seize the opportunity to inflict asymmetrical eDiscovery costs on businesses, even for frivolous cases. Studies have similarly revealed that private rights of action fail to compensate consumers even when a violation has been shown, and instead primarily benefit the plaintiff's bar. For these reasons, no state except California–which like MIPSA, restricted its PRA to specific types of data breaches–has chosen to go down this path. Unfortunately, this nevertheless predictably triggered a raft of frivolous lawsuits trying to bootstrap privacy claims in that state.

We thank you very much for your consideration, and would be happy to discuss any of these issues further with you, if helpful.

Respectfully submitted,

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