MARYLAND RETAILERS ALLIANCE

*The Voice of Retailing in Maryland*

**HB567 Maryland Online Data Privacy Act of 2024**
**Finance Committee**
**March 21st, 2024**

**Position:** Unfavorable

**Comments:** The Maryland Retailers Alliance (MRA) is opposed to changes and omissions that were made to HB567 during the legislative process in the House of Delegates. We would urge the committee to reject this amended bill as presented and amend it to match the Senate's work on SB571 with some small additional amendments. We would recommend changes in the following policy areas. Thank you for your consideration.

1. <u>**Customer Loyalty Plan Provisions**</u>

   □ <u>REQUESTED AMENDMENT</u>:

   □ STRIKE ALL REVISIONS IN REPRINT PG. 23, LINES 19-3 ON THE NEXT PAGE; REVERT LANGUAGE TO ORIGINAL FORM.

   □ <u>REASONING</u>:

   □ The State should protect the right of Maryland consumers and retailers to have loyalty programs on the terms they choose so long as the programs are bona fide. The State should not be in the business of writing customer loyalty programs, especially because customers have to opt-in to participate in them.

   □ Although the House bill would permit controllers <u>outside</u> of a loyalty program to sell data or use it for targeted advertising <u>without</u> an opt-in from the consumer, it would prohibit controllers that operate bona fide loyalty programs – which can be joined only <u>with</u> an opt-in – from making the same transfer in their loyalty program. This is inconsistent and unpredictable public policy, injecting confusion and uncertainty into the law.

   □ We oppose the revised language in the bill that would prevent Maryland consumers from enjoying the same benefits from participating in retailers' loyalty plans that consumers would have in all other states. The bill should revert to the previous language of this section that we could support.

2. <u>**Cross Liability Protections**</u>

- REQUESTED AMENDMENT (previously requested by MRA in letter dated Feb. 14):
  - Page 35, LINE 11-15, inclusive – STRIKE AND REPLACE WITH:

    “A controller or processor that discloses personal data to a processor or third party in accordance with this subtitle shall not be deemed to have violated this subtitle if the processor or third party that receives and processes such personal data violates this subtitle, provided, at the time the disclosing controller or processor disclosed such personal data, the disclosing controller or processor did not have actual knowledge that the receiving processor or third party would violate this subtitle. A third party or processor receiving personal data from a controller or processor in compliance with this subtitle is likewise not in violation of this subtitle for the transgressions of the controller or processor from which such third party or processor receives such personal data, provided, at the time the receiving processor or third party did not have actual knowledge that the disclosing controller or processor would violate this subtitle.”

- REASONING:
  - The protection provided to third party controllers or processors in 14-4611(D) needs to run both ways to also protect controllers from the independent misconduct of third-party processors and controllers, as it does in most state privacy laws.
  - Controllers must similarly be protected from the violations of the law by processors and third parties and held harmless unless they have actual knowledge that the processor or third party intends to violate the law with the consumer data received from the controller.
  - We urge the committee to provide common-sense liability protections to protect controllers that are complying with the law from being held liable for violations by processors or third parties, and the suggested language above (modeled on liability protection language adopted in other state privacy laws) ensures that all parties have the same cross-protections.

3. **Data Minimization**

- REQUESTED AMENDMENT:

    - PG. 21, lines 18-20: Strike in its entirety section 14-4607(A)(1)
    - PG. 21,line 21-22: Strike "strictly necessary" and replace with "reasonably necessary"
- REASONING:
    - No state has passed opt-in requirements for targeted advertising. All states operate on an opt-out basis which is a pro-consumer, pro-business decision that makes sense.
    - The definition of sensitive data includes things that could be implied about a person based on purchases or clicks on certain items (for example, race based on cosmetic choices or religion based on holiday celebration items), but this information is based on assumptions made by technological assessments of online activity. Basing laws on possible inferences about a person based on their online research or retail purchases is inappropriate and problematic.

4. **Private Right of Action**

- REQUESTED AMENDMENT:

    - We urge the committee to insert language that makes it clear that the law does not authorize private right of action. We would request the following: "Nothing in this bill shall be construed as providing the basis for, or subject to a private right of action."
    - We urge the committee to insert a right to cure in HB567 in the same form as the Senate bill. This is critical to the many small businesses across the state who are not familiar with data privacy laws and may need an opportunity to correct a disclosure to a consumer.