



March 8, 2023

Senate Finance Committee**S.B. 698 (Online and Biometric Data Privacy Act)****Written testimony for hearing, submitted by the Insights Association**

The Insights Association (IA), the leading nonprofit trade association for the market research and data analytics industry, writes to comment on comprehensive privacy legislation before your committee today, the Online and Biometric Data Privacy Act (S.B. 0698), on behalf of our more than 150 members in Maryland, and to propose amendments.

Our more than 7,100 overall members are the world's leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations and their employees, students and citizens. With that essential understanding, leaders can make intelligent decisions and deploy strategies and tactics to build trust, inspire innovation, realize the full potential of individuals and teams, and successfully create and promote products, services and ideas.

The Insights Association supports comprehensive federal privacy legislation that moves beyond the old-school notice-and-choice model, instead of a patchwork of conflicting state privacy laws built on those old models. A study¹ conducted by our member companies Research Narrative and Innovate MR, on behalf of Privacy for America, revealed that nearly all Americans surveyed (92 percent) believe it is important for Congress to pass new legislation to protect consumers' personal data, and a majority (62 percent) prefer federal regulation over individual state regulations. Four out of five voters (81 percent) support a national standard that outright prohibits harmful ways of collecting, using, and sharing personal data. Congress made some progress on that front in 2022, and we are pushing hard for a federal law this year.

However, should you and your fellow legislators decide to move forward with S.B. 0698, IA urges you to consider several important improvements:

- 1. Ensuring that targeted advertising does not include independent audience measurement:** Audience measurement, particularly independent audience measurement, builds the currency upon which advertising and other content, online and off, is valued, and collects covered data about individuals for the purpose of understanding groups. Advertisers, for

¹ New Study Shows Overwhelming Bipartisan Support for U.S. Federal Privacy Legislation. DECEMBER 1, 2021. <https://www.insightsassociation.org/News-Updates/Articles/ArticleID/289/New-Study-Shows-Overwhelming-Bipartisan-Support-for-U-S-Federal-Privacy-Legislation>

example, pay based on the number of "impressions" for online ads, and independent measurement verifies that the number of impressions is accurate. Local Maryland businesses would bear the burden of these elevated costs for every impression inaccurately added to the count. Independent measurement also allows content creators to know their actual viewership in relation to the marketplace thus allowing for accurate programming decisions. The exception would still require that the data would be limited "solely" to measurement, preventing its use for other purposes. Therefore, IA encourages you to clarify that this exception covers independent measurement, and content as well as advertisement, just like the language in the federal privacy bill ADPPA that passed committee in the House in 2022, by tweaking § 14–4501 (z)(2)(iv) as follows (with additions in bold): *“processing personal data solely to measure or report advertising **or content** performance, reach, or frequency, **including independent measurement.**”* This is a slightly expanded provision from the targeted advertising definitions in recent privacy laws in Colorado, Connecticut, Utah and Virginia.²

2. **Protect market research and/or audience measurement more broadly:** To protect the essential production of insights while still protecting consumers, IA urges you to add a new exemption to the list in § 14–4503 (B) for market research -- *“information for purposes of investigating the market for or marketing of products, services, or ideas, where the information is not: (i) integrated into any product or service; (ii) otherwise used to contact any particular individual or device; or (iii) used to advertise or market to any particular individual or device.”*³ – and/or a new exemption to the list for audience measurement – *“information for purposes of independently measuring or reporting advertising or content performance, reach, or frequency pursuant to a contract with a controller that collected personal information in accordance with this act.”*⁴
3. **Tighten the definition of “sensitive data”:** The current definition of “sensitive data” in § 14–4501 (Y) includes relatively common demographic data, especially data revealing “racial or ethnic origin”– data so common that it is asked by the decennial census. If you should choose not to accept our recommendations above to protect market research and audience measurement, the Insights Association urges you even more so to avoid imperiling even the most basic of research studies by amending § 14–4501 (Y)(1) with language at the end: *“, except to the extent such data is used solely for purposes of determining participation of an individual in market research.”* A new definition of “market research” could then be added to § 14–4501 to mean: *“the collection, use, maintenance, or transfer of personal data as*

² See 2021 Colorado S.B. 190 (“processing personal data solely for measuring or reporting advertising performance, reach, or frequency”), 2022 Connecticut S.B. 6 (“processing personal data solely to measure or report advertising frequency, performance or reach”), 2021 Virginia S.B. 1392 (“Processing personal data processed solely for measuring or reporting advertising performance, reach, or frequency”), and 2022 Utah S.B. 227 (“processing personal data solely to measure or report advertising: (A) performance; (B) reach; or (C) frequency”).

³ This definition of market research is used by the model federal privacy legislation put forward by Privacy for America in Part I, Section 1, R: <https://www.privacyforamerica.com/overview/principles-for-privacy-legislation-dec-2019/> and also by the federal privacy bill passed out of committee in 2022, ADPPA.

⁴ This exemption was used in Florida H.B. 9 in 2022.

reasonably necessary to investigate the market for or marketing of products, services, or ideas, where the information is not: (i) integrated into any product or service; (ii) otherwise used to contact any particular individual or device; or (iii) used to advertise or market to any particular individual or device.”

4. **Ensure that discrimination provisions do not impede participant incentives for research subjects:** IA is concerned that choosing research subjects for participation in market research, when it involves a participant incentive, could be misconstrued as discrimination under § 14–4507(E). Participant incentives are an important tool in the insights industry toolkit to encourage research subjects’ involvement in market research involving their covered data, as response rates have declined. Participant incentives are particularly key to research in which the research subject has affirmatively consented to participate. Research subjects are sought in certain segments and numbers for market research studies, with the samples varying depending on the needs and scope of the study. For example, a study may oversample or focus entirely on black homosexual women in their 30s and 40s – if a participant incentive is involved, would other potential research subjects disqualified from participation potentially have been discriminated against? To preserve the ability to conduct market research and to adequately include any necessary populations, IA urges you to add a new clause (3) in § 14–4507(F) to clarify the continued legality of participant incentives for research subjects in face of the bill’s discrimination provisions: *“Prevent a controller from offering a financial incentive or other consideration to an individual for participation in market research as a research subject, defined as the collection, use, maintenance, or transfer of personal data as reasonably necessary to investigate the market for or marketing of products, services, or ideas, where the information is not: (i) integrated into any product or service; (ii) otherwise used to contact any particular individual or device; or (iii) used to advertise or market to any particular individual or device.”*
5. **Limit the use of an authorized agent to only where necessary:** § 14–4506 of the Act would not tangibly limit the exercise of an opt out by an authorized agent of the consumer; anyone could submit a request through an authorized agent. This option will be unnecessary in most cases, increase paperwork associated with the verification process, and open the door for fraudulent requests. Except in cases where the consumer is a minor, or someone who genuinely needs an authorized agent to submit a request (such as an elderly or incapacitated individual), requiring requests to be submitted by consumers themselves would better serve the purpose of S.B. 0698.

The Insights Association and our members support strong consumer privacy protections within a regulatory framework that still allows for the pursuit of insights, as we’ve discussed above. We look forward to talking with you and your fellow legislators and staff further, and providing more information regarding these issues and Maryland’s Online and Biometric Data Privacy Act (S.B. 0698).

Sincerely,

Howard Fienberg
Senior VP, Advocacy
Insights Association

P R O T E C T  C O N N E C T  I N F O R M  P R O M O T E