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March 28, 2024

TO: The Honorable C.T. Wilson, Chair
Economic Matters Committee

FROM: Hanna Abrams, Assistant Attorney General

RE: Senate Bill 541 – Consumer Protection – Maryland Online Data Privacy
Act of 2024 (FAVORABLE WITH AMENDMENTS)

The Consumer Protection Division of the Office of the Attorney General supports Senate Bill 541 (“SB 541”), sponsored by Senators Gile, Hester, Augustine, Feldman, and Ellis and Chair Beidle, but, as discussed below, encourages the Economic Matters Committee to conform SB 541 to the House cross-file, House Bill 567. Senate Bill 541 provides Marylanders with much needed control over who can collect, share, use, and sell their personal information.

Today, companies collect vast amounts of consumer data without consumer knowledge or consent. This data is sometimes used to serve consumer needs, but it can also be used to target, exploit, and expose consumers in harmful and sometimes dangerous ways.¹ Consumer data is often combined to provide detailed insights into very personal issues including mental health, gender, racial identity, religious beliefs, sexual preferences, and even our precise locations.² Indeed, data brokers compile data into lists of specific individuals with highly personal characteristics³ and sell it to third parties to be used to deliver everything from targeted

¹ See Technology Safety, Data Privacy Day 2019: Location Data & Survivor Safety (Jan. 28, 2019), <https://www.techsafety.org/blog/2019/1/30/data-privacy-day-2019-location-data-amp-survivor-safety>.

² Lee Matthews, *70% Of Mobile Apps Share Your Data with Third Parties*, Forbes, (June 13, 2017), <https://www.forbes.com/sites/leemathews/2017/06/13/70-percent-of-mobile-apps-share-your-data-with-third-parties/#562270ce1569> (finding that at least 70% of mobile apps share data with third parties, and 15% of the apps reviewed were connected to five or more trackers).

³ Drew Harwell, *Now For Sale: Data on Your Mental Health*, Washington Post (Feb.14, 2023), <https://www.washingtonpost.com/technology/2023/02/13/mental-health-data-brokers/> (citing a Duke University study that found that based on data amassed online data brokers marketed lists of individuals suffering from anxiety and a spreadsheet entitled “Consumers with Clinical Depression in the United States”).

advertising,⁴ to differential pricing, to enable algorithmic scoring⁵ which can have discriminatory outcomes.⁶ Unlike consumers in thirteen other states, Maryland consumers have no knowledge or control over what is collected about them or what is done with that personal information.

Senate Bill 541 provides individuals with some transparency into and gives users the right to access, correct, or delete their data, allowing individuals to protect themselves. They can reduce their data footprint, or remove their data from insecure third parties, minimizing the risk of fraud, identify theft, and exploitation.

Importantly, SB 541 sets an important baseline requirement that entities only collect data that “is reasonably necessary and proportionate to provide or maintain a specific product or service requested by the consumer to whom the data pertains.” This limits the misuse and accidental leakage of data by restricting what is collected at the outset.

Privacy Enforcement and Education Unit

Senate Bill 541 creates a comprehensive scheme of consumer rights and the Consumer Protection Division will require additional resources in order to implement and enforce this bill, especially because SB 541 excludes the private right of action under § 13-408 of the Consumer Protection Act. Accordingly, the Attorney General requested that the General Assembly create a Privacy Enforcement and Education Unit in the Consumer Protection Division, however it does not appear that the requested Unit will be funded this year.

Comparison to House Bill 567

We note that there are some differences between Senate Bill 541 and House Bill 567.

§ 14-4601 Definitions:

- *Biometric Data*: Senate Bill 541 has amended the definition of “biometric data” in a manner inconsistent with existing Maryland law. The definition found on page 3, line 21-22 of SB 541 creates a definition that is different from the one found in the Maryland Personal Information Protection Act which defines “biometric data” to include “any other unique biological characteristics that *can be* used to

⁴ *FTC Enforcement Action to Bar GoodRx from Sharing Consumers’ Sensitive Health Info for Advertising* (Feb. 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising>.

⁵ A Berkeley study found that biases in “algorithmic strategic pricing” have resulted in Black and Latino borrowers paying higher interest rates on home purchase and refinance loans as compared to White and Asian borrowers. This difference costs them \$250 million to \$500 million every year. Laura Counts, *Minority homebuyers face widespread statistical lending discrimination, study finds*, Haas School of Business at the University of California, Berkeley, (Nov. 13, 2018), <http://newsroom.haas.berkeley.edu/minority-homebuyers-face-widespread-statistical-lending-discrimination-study-finds/>; Upturn, *Led Astray: Online Lead Generation and Payday Loans*, (Oct. 2015), <https://www.upturn.org/reports/2015/led-astray/>. See also Yeshimabeit Millner and Amy Traub, *Data Capitalism and Algorithmic Racism, Data for Black Lives and Demos* (2021), https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf.

⁶ Julia Angwin et al., *Facebook (Still) Letting Housing Advertisers Exclude Users By Race*, ProPublica (Nov. 21, 2017), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin>.

uniquely authenticate a consumer's identity" (Md. Com. Law § 1-3501(e)(1)(i)(6)).⁷ The Division requests that the Economic Matters Committee not adopt the definition set forth in SB 541 since introducing a different definition for the same term in statutes governing related conduct will lead to confusion.

- *Decisions that produce legal or similarly significant effects concerning the consumer:* Page 6, line 6, of SB 541 removes the term "insurance" from this definition. All other states that define this term in their privacy law include "insurance" in this definition. Senate Bill 541's exclusion would lead to inconsistency between the States' privacy laws and could lead to unnecessary confusion.⁸

§ 14-4603 Exemptions:

- On page 14, lines 1-6, Senate Bill 541 includes an exemption not found in HB 567 for "a nonprofit controller that process or shares personal data for the purpose of assisting law enforcement agencies in investigating criminal or fraudulent acts relating to insurance; or first responders in responding to catastrophic events." This exemption, which appears to exempt a single entity, is duplicative and unnecessary as this conduct is already permitted under § 14-4612(8)-(9) which ensures that controllers are allowed to take immediate steps to protect life or physical safety and to prevent harm, fraud, or any other type of illegal activity.⁹
- The Division notes that there is a difference between the language excluding "medical records" found in HB 567 and SB 541.¹⁰ The language found in SB 541 (page 14, line 30 through page 15, line 14) more clearly reflects the intent to exclude only records that are protected under the Maryland Medical Records Act, but not under the Health Insurance Portability and Accountability Act.
- The Division is concerned about the exemption found in SB 541, which is not in HB 567, for personal data that "is collected . . . in furtherance of the business of insurance" (page 16, lines 11-14). The exemption could create a loophole for secondary uses as it is focused on the purpose of the *collection* and does not limit its use to purposes that are "in furtherance of the business of insurance." We also

⁷ Page 3, line 22 of SB 541 defines biometric data to include "any other unique biological characteristics that *are* used to uniquely authenticate a consumer's identity."

⁸ See Colorado Data Privacy Act, 6-1-1303(10), C.R.S.; Connecticut Data Privacy Act, Section 1(12); Delaware Personal Data Privacy Act, Section 1(13); Indiana Consumer Data Protection Act, Section 11; Montana Consumer Data Privacy Act, Sec. 2, (10); New Jersey Act (S332), page 9, line 32; Oregon Consumer Privacy Act, Section 1(10); Tennessee Information Protection Act, 47-18-3201(10); Virginia Consumer Data Protection Act, Va. Code § 59.1-575.

⁹ Senate Bill 541, page 33, lines 22-30.

¹⁰ Compare HB 567, p.14, line 31 through page 15, line 12 with SB 541 page 14, line 30 through page 15, line 14.

note that there is already an exemption for both institutions *and data* that are subject to Title V of the Federal-Gramm-Leach Bliley Act (§ 14-4603(3)).¹¹

§ 14-4605 Consumer Rights

- Page 19, lines 12-14: Both HB 567 and SB 541 provide consumers with appeal rights, but SB 541 deletes the requirement that a controller must inform consumers whether their request has been complied with or denied. Deleting this provision would make it difficult for consumers to determine whether they should invoke their appeal rights.

§ 14-4607

- Page 21, lines 25-27: Senate Bill 541 removes the individual consent requirement and permits the collection of personal data for the sole purpose of content personalization. The removed language ensures that consumers who would like content personalization have the opportunity to receive this feature, but that those who do not want content personalization do not have their data collected unnecessarily. It merely requires consumers to consent to content personalization.
- Page 22, lines 4-7: Senate Bill 541 permits the sale of children's data with consent. House Bill 567 provides more robust protections for children by prohibiting the sale of personal data of underage users.¹²
- Page 23, line 23-27: Senate Bill 541 lacks language added in HB Bill 567¹³ that closes a loophole created in the loyalty program exemption.

§ 14-4612

- The Division is concerned that SB 541 adds a safe harbor provision not found in HB 567 that disincentivizes controllers and processors from taking steps to ensure that third parties will not misuse the data. Senate Bill 541 (page 34, line 29 – page 35, line 4) protects controllers and processors from third-party violations unless the controller had “actual knowledge” at the time the data was disclosed that the recipient would violate SB 541. Given the use of companies overseas in countries that do not respect American law such a safe harbor poses a very real threat to both national security and individual privacy.

§ 14-4614

- Senate Bill 541 adds a right to cure that unnecessarily codifies a process similar to the mediation process currently undertaken by the Consumer Protection Division when it receives a consumer complaint.

¹¹ Senate Bill 541 at page 13, lines 28-30.

¹² House Bill 567 at page 22, lines 1-2.

¹³ House Bill 567 at page 23, line 19 – page 24, line 4.

We respectfully ask that the Economic Matters Committee issue a favorable report on Senate Bill 541 but conform the bill to House Bill 567 for the reasons discussed above.

cc: Members, Economic Matters Committee
The Honorable Dawn Gile
The Honorable Sara Love