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TO: The Honorable Luke Clippinger
Chair, Judiciary Committee

FROM: Carisa A. Hatfield, Esq.
Assistant Attorney General
Counsel, Maryland Sexual Assault Evidence Kit Policy and Funding Committee

RE: HB1047- Consumer Protection – Self–Administered Sexual Assault Evidence Collection Kits **(Support w/Sponsor Amendments)**

The Office of the Attorney General (OAG), on behalf of the Maryland Sexual Assault Evidence Kit (SAEK) Policy and Funding Committee, urges a favorable report of House Bill 1047 which, as amended by the sponsor, would codify the Committee's recommendations regarding self-administered sexual assault kits, which are as follows:

(1) Ban the sale, offer for sale, or distribution of self-administered sexual assault kits unless they are state-issued;
(2) Violations of the ban should be subject to an enforcement action by the Consumer Protection Division and/or a civil fine;
(3) Kits should not be excluded from use in criminal prosecution if they are brought to law enforcement or prosecutors by a victim; and
(4) Enforce a survivor's right to sue manufacturers of these kits by declaring any required arbitration, indemnification, or limited liability clauses null and void.

By way of background, the SAEK Policy and Funding Committee was created by the General Assembly in 2017 to create effective statewide policies regarding the collection, testing, and retention of medical forensic evidence in sexual assault cases and increase access to justice for sexual assault victims. Each year, the Committee is also required to submit an annual report on its activities during the prior fiscal year to the Governor and the General Assembly. Earlier this

year, the Committee issued its sixth annual report detailing its activities which included managing $2.1 million in federal Sexual Assault Kit Initiative funding, implementing recent SAEK reforms, providing guidance and training to stakeholders on State laws and policies governing SAEKs, and developing new recommendations for improving Maryland's handling of SAEKs and its support of victims.

In 2023, the General Assembly passed and the Governor signed into law HB758/SB789, which required the SAEK Committee to issue a report containing the following three components: (1) guidance on the transfer of sexual assault evidence kits to law enforcement collected before January 1, 2000; (2) recommendations regarding the use of self-administered sexual assault kits in Maryland; and (3) a plan to educate consumers about self-administered SAEKs collaboratively developed with the Office of the Attorney General's ("OAG") Consumer Protection Division ("CPD"). This report was to be issued by the Committee by the close of business on December 1, 2023. The Committee issued the report timely on December 1, 2023 as to points one and three, but asked for more time for research and discussion regarding the second point. After careful consideration, the Committee issued its supplemental report as to point two on February 8, 2024. In that report, the Committee made recommendations regarding self-administered sexual assault kits which have resulted in the introduction of HB1047 and its cross-filed bill, SB949.

The Committee's investigation began by determining if other jurisdictions had identified concerns with either the Leda Health kit itself or with any predecessor self-administered kits. The MeToo Kit, first brought to public attention in 2019, was a predecessor of the Leda Kit with at least one of the founding partners. Between 2019 and 2021, eight states' attorneys general issued warnings or cease-and-desist letters to MeToo and MeToo's predecessor, Leda Health, including New York[1], Oklahoma[2], Michigan[3], Virginia[4], New Jersey, Connecticut, and Pennsylvania[5]. In 2020, New Hampshire banned the sale of "over the counter" self-administered sexual assault evidence kits,[6] and Washington State followed suit in 2023.[7] Washington State particularly articulated concerns during the legislative practice regarding Leda Health's trade practices and its wish to protect crime victims from being misled by the company's product as marketed to university students.

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[1] "Consumer Alert: Attorney General James Orders Sexual Assault Evidence Kit Companies To Cease And Desist Operations." Published September 12, 2019. https://ag.ny.gov/press-release/2019/attorney-general-james-orders-sexual-assault-evidence-kit-companies-cease-and.

[2] "Attorney General Hunter Issues Consumer Alert, Cease & Desist Letters to At-Home Rape Kit Companies." https://oag.ok.gov/articles/attorney-general-hunter-issues-consumer-alert-cease-desist-letters-home-rape-kit-companies.

[3] "Notice of Intended Action Dated August 29, 2019." https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2019/August/Notice_of_Intended_Action_to_MeToo_Kits_Company_08-29-19_664596_7.pdf?rev=467467d7282c44a68b5ba316172bec91&hash=67B8E5F1F6939D939350CF213B6B3059.

[4] "Herring Issues Warning About Self-Administered Sexual Assault Evidence Kits." Published September 10, 2019. https://web.archive.org/web/20191213142624/https:/www.oag.state.va.us/media-center/news-releases/1525-september-10-2019-herring-issues-warning-about-self-administered-sexual-assault-evidence-kits

[5] The Committee has reached out to stakeholders in these states after obtaining this information from the article, "Washington state considers banning over-the-counter rape kits," posted on March 7, 2023. https://crosscut.com/politics/2023/03/washington-state-considers-banning-over-counter-rape-kits. As further information is received, this report will be updated.

[6] House Bill 705, Signed by Governor Sununu on July 20, 2020, included a provision banning the sale of "over the counter" rape kits in New Hampshire. https://legiscan.com/NH/text/HB705/id/2194274/New_Hampshire-2020-HB705-Amended.html.

[7] House Bill 1564 passed the Washington State Senate on April 13, 2023 and had an effective date of July 23, 2023. https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/House/1564.SL.pdf?q=20231018113822.

The Committee in its research identified three primary areas of concern as it related to the product and its potential uses in Maryland. First, as has been articulated by many jurisdictions, the Committee is concerned about the product's viability in a criminal legal setting. The Committee conducted a nationwide review to determine whether such a case existed; however, the Committee has not located a single case where a self-administered kit marketed by a commercial manufacturer has been accepted as evidence of a sexual assault in a criminal proceeding. When discussing this with Leda Health representatives in a meeting on October 6, 2023, Leda Health stated that self-administered kits had been used in the San Francisco Bay Area during the COVID-19 Pandemic. However, when pressed, they acknowledged that the Bay Area kits were not kits produced by a commercial manufacturer. Rather, according to Leda's own admission, they were kits distributed by the State of California that conformed to the state's guidelines.

One of the greatest concerns around admissibility is the lack of ability to track a chain of custody for the kits. The currently available self-administered sexual assault kits offer the option of telehealth visits that provide a forensic nurse to instruct the victim on specimen collection, as well as witness collection and sealing of specimens. The subcommittee inspected the kit and spoke with representatives from Leda Health who confirmed that the telehealth visit is optional, and specimens can be processed without a nurse to provide instruction and witness collection. Without the guidance of a medical professional, a victim may inadvertently collect genetic samples incorrectly and receive no results, incomplete results, or contaminated results. After collection, the kit can be mailed by the victim to an accredited lab where the kit would be tested for foreign DNA and the kit is retained by Leda Health for its records. The results sent to the victim are limited to reporting presence or absence of foreign DNA. Victims are not provided with the opportunity for counseling about the meaning, potential implications, and limitations of the results.

By contrast, a SAEK collected at the hospital clearly meets chain of custody requirements and is tracked from the moment it is opened, used, sealed, transferred (by a forensic nurse examiner (FNE) or other approved hospital staff) to the custody of law enforcement, and stored in accordance with Maryland law. The tracking of these kits will be even easier to follow once the statewide SAEK Tracking System through InVita Healthcare is rolled out. Rollout for this system is anticipated between March and August of this year, and as required by 2023's SB615, every kit held by the state will be enrolled in that system. SB789 also requires all stakeholders to retain SAEKs for a minimum of seventy-five (75) years, which is the longest retention period in the United States. This means that victims will continue to have access to their kit and the opportunity to decide what to do with it for decades.

Additionally, commercially marketed, self-administered sexual assault kits are not required to be sent for testing by law enforcement. While SB789 allows for a victim to submit their self-administered sexual assault kit to law enforcement, law enforcement has no requirement to send it in for testing. This is because commercially marketed, self-administered sexual assault evidence kits are not considered SAEKs under Maryland law. In fact, when this question was raised during the 2023 legislative session, commercially marketed, self-administered sexual assault kits were explicitly excluded from the new, proposed definition of SAEKs. Additionally, as currently marketed, there are significant concerns that these self-administered kits would not be eligible for entry into the Federal Bureau of Investigation's (FBI) Combined DNA Index System ("CODIS"). CODIS hits allow forensic scientists and law enforcement to find patterns in DNA evidence and identify serial offenders. The inability of forensic labs to trace the evidence submitted in a commercially marketed, self-administered sexual assault evidence kit raises the possibility of a serial offender who cannot be held

accountable.

In addition to criminal legal concerns, the Committee has concerns around both the privacy of data obtained in these kits and the limitation on victims' rights to pursue remedies available to them. These privacy concerns may result in a victim who submits one of these kits in Maryland being subjected to a violation of their most private data without legal recourse. Maryland does not currently have a general privacy law that provides consumers with the right to delete DNA evidence submitted in a product such as a self-administered sexual assault kit. This means that a survivor that submits a commercially marketed, self-administered sexual assault evidence kit has no ability to control its use at a later date, and it remains subject to the subpoena power of a state's attorney for a criminal matter or a court or attorney in a civil proceeding. Additionally, Maryland's Genetic Information Privacy Act only permits a company to collect genetic data from a consenting party. It is unclear whether a company could obtain consent from all parties in instances of sexual assault.

In addition to the potential for a victim's private data to be exposed without the opportunity to reclaim it, the terms and conditions of the product currently on the market prohibit a victim from suing the company if there are any issues with the product. In fact, a victim would be forced to enter arbitration and denied the right to sue altogether, nor would they be allowed to join any class action against the company. They would also be required to indemnify and hold harmless Leda Health and associated entities just for using the product. A sponsor amendment has been introduced to address this issue and the OAG supports this amendment.

The Committee also has concerns about the long-term support available for a survivor in both the medical and advocacy services areas. These concerns were raised by forensic nursing professionals, by the state sexual assault coalition, and by victim advocate representatives who staff the Committee. Firstly, the Committee is concerned that a victim that uses a self-administered sexual assault evidence kit may not have immediate access to advocacy support services during the evidence collection process, and resources through a private company like Leda Health may only be available to victims for a limited time. In Maryland, a victim may have an advocate present with them before, during, and after a SAFE. The advocate is there to provide support to the victim during a difficult time and may act as an advocate with medical professionals if a victim is feeling uncomfortable with certain aspects of the exam, or if the victim feels like their patient rights are not being honored while they are in the hospital. That advocate then becomes a connection for the victim after their exam and can make referrals to local counseling, crisis intervention services, civil legal services, and crime victims' rights representation in the event of a criminal proceeding. A victim's access to crime victims' rights representation allows them to engage with the system through experienced professionals who can explain the criminal legal system in an accessible, trauma-informed way. The advocate and attorney can help a victim feel heard in a process where it can feel like a victim's voice goes unheard.

Additionally, there are concerns that a patient who does not engage with medical services at the time they use a commercially marketed, self-administered sexual assault evidence kit may have to pay for those services if they are needed later. Access to prophylactic medication for human immunodeficiency virus (HIV), sexually transmitted infections (STIs), and pregnancy prevention is time sensitive and, if not addressed adequately through a self-administered sexual assault evidence kit company, a survivor could miss the window for this critical care. Further, it is unclear if these medications, or any related follow-up care and testing, are provided to survivors free of cost through commercially marketed, self-administered sexual assault evidence kits. In contrast, Maryland has ensured survivors of sexual assault that receive a SAFE at a

medical facility have access to these medications, along with follow-up care and testing, free of cost.

The Committee spent considerable time reviewing the contents of these kits, the available resources provided by them, and if these kits could be used in Maryland as a stop gap resource for survivors who either cannot or do not want to access a forensic exam at a hospital. They spoke with stakeholders and outside entities, including Leda Health, to fully understand the options available. The Committee discussed the limitation on resources for SAFE exams and the staggering percentages of victims who never come forward and receive a forensic exam and acknowledges there is much to do to close the gaps in services. Even so, the Committee's ultimate conclusion is that these kits should not be allowed in Maryland. The risks of allowing such a product into Maryland far outweigh the potential benefits.

The Committee has agreed that there should be consequences in the event that the sale, offer for sale, or distribution of these products occurs in Maryland. The Committee looked to the Washington state and New Hampshire legislation to determine what those consequences should be. Based on its research, the Committee believes that attempts to offer this product commercially are an unlawful and deceptive trade practice and therefore HB1047 classifies such action as a violation of the Consumer Protection Act. Additionally, the Committee believes that a fine not exceeding $1000 per kit is appropriate. Monies from those who violate this proposed law would be deposited into a special fund that will benefit continuing education for FNEs, including but not limited to, funding tuition for FNE coursework, best practices training courses, course materials, and bringing in trainers to provide training on specialized areas in the field.

While the Committee has determined that it cannot allow the widespread sale of these kits in the state, it also does not wish to penalize individuals who may encounter these kits and choose to use them. If a victim either procures an individual kit from another state, is provided a kit by a family member or friend, or otherwise comes into possession of the kit, the Committee does not want to stop that individual from presenting their kit to law enforcement or prosecutors in a criminal proceeding. Additionally, the Committee does not want the kits to be restricted from use in a criminal process purely because it was acquired illegally. Rather, the Committee wishes to give the factfinders in such a case (i.e. law enforcement, a State's Attorney, or a judge) the ability to review the evidence and make a determination based on the circumstances of the case and the validity of the evidence.

In addition, the Committee is also pursuing legislation (HB1127) to create alternatives that will increase access to SAFE exams in Maryland through a telehealth pilot program. That bill enables the Committee to fully investigate and determine feasibility for such a program in Maryland and make recommendations to the legislature regarding next steps to establish, fund, and sustain telehealth practices for SAFE examination in areas where there is limited access or no access to forensic medical services. The Committee is also continuing to work on opportunities to close the reporting gap in Maryland beyond telehealth to ensure that victims feel that they are fully informed on all options available to them and choose the option that will best suit their needs as they move forward.

In consideration of the above, the Committee requests a favorable report with the sponsor's amendments for HB1047.

cc: Committee Members

This bill letter is a statement of the Office of Attorney General's policy position on the referenced pending legislation. For a legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Counsel to the General Assembly, Sandy Brantley. She can be reached at 410-946-5600 or sbrantley@oag.state.md.us