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February 27, 2025

TO: The Honorable Pamela Beidle, Chair
               Economic Matters Committee

FROM: Hanna Abrams, Assistant Attorney General
               Consumer Protection Division

RE: Senate Bill 936 – Consumer Protection – High–Risk Artificial Intelligence
               – Developer and Deployer Requirements
               (SUPPORT WITH AMENDMENT)

The Consumer Protection Division of the Office of the Attorney General (the "Division") supports Senate Bill 936 ("SB 936"), sponsored by Senators Hester, Gile, and Love, with amendments, but urges the Finance Committee to ensure that adequate resources are allocated to ensure proper enforcement. Senate Bill 936 establishes guard rails on the development and use of artificial intelligence to protect Marylanders from discrimination.

The Division supports the General Assembly's attention to algorithmic harms affecting Marylanders. Algorithm-driven systems are increasingly used to streamline decision-making processes across many significant areas. These systems are designed to execute the steps humans traditionally perform but with far less accountability for discriminatory outcomes. Robust safeguards and restrictions on algorithm-driven decision-making are essential to protecting Marylanders.

Existing law does not address the responsibility of developers or even, in some cases, deployers for the discriminatory harms the artificial intelligence systems they design and deploy cause. The algorithms used are black boxes designed and disseminated by developers and deployers; there is no transparency or accountability. As a result, enforcement of existing anti-discrimination laws to date has not kept up with developments in algorithm-driven decision-making. Senate Bill 936 aims to rectify this gap.

<u>The Division supports SB 936, but believes the following changes are warranted:</u>

Eliminate the rebuttable presumption

The rebuttable presumption contained in SB 936 undermines its purpose and interferes with enforcement. Senate Bill 936 includes a "rebuttable presumption" that developers and deployers

"used reasonable care as required under this subsection if the developer/deployer complied with the provisions of this section." This significantly delays any resolution by requiring that the Division demonstrate lack of reasonable care twice—first to overcome the rebuttable presumption, and then to demonstrate the violation. The evidence for both would likely be the same, but the requirement to overcome a rebuttable presumption thwarts consumer protection and delays consumer relief. The rebuttable presumption undermines the intent of consumer protection laws, which are meant to safeguard consumers. Md. Code, Com. Law § 13-102.

The bill also includes a non-lapsing cure period that weakens its protections. Cure periods are intended to avoid penalizing companies while innovative legislation is rolled out. However, cure periods nevertheless require the Division to expend resources to investigate a violation but, unlike a case filed or settled by the Division, the company's conduct is not under any specific future constraints and the Division does not receive reimbursement for the costs expended in investigating the matter. If a cure period is included in SB 936, it should mirror the cure period included in the Maryland Online Data Privacy Act. Com. Law § 14-4614. The cure period should be: (1) at the Division's discretion; and (2) should sunset after one year. *Id*.

Loopholes must be closed

The loopholes contained in SB 936, if interpreted broadly, could undermine the very protections that the bill intends to provide. The bill exempts AI technology that performs "narrow procedural task[s]" from its definition of high-risk AI. This term is undefined, and companies may argue that all manner of high-stakes decisions – screening out resumes, scoring college applicants – are "narrow procedural tasks." The bill's trade secret and confidential information protections are overbroad. Companies should not be able to unilaterally withhold crucial information or hide evidence of discrimination by claiming that such information is a trade secret or confidential information.

Enforcement resources must be allocated

Senate Bill 936 requires extensive manpower and technological resources in order to properly investigate potential violations. Moreover, as discussed above, the inclusion of a non-lapsing right to cure is contrary to consumer protection and undermines the ability of the Division to recover the costs of an investigation. This, along with the inclusion of the rebuttable presumption, will increase the resources necessary if SB 936 is to be enforced.

Ensure that existing antidiscrimination laws are not weakened

The bill should clarify that compliance with SB 936 cannot be used as a shield in cases alleging violations of traditional anti-discrimination laws by either expressly stating that there are no unintended consequences or by linking violations of SB 936 to violations of the Consumer Protection Act.

Line Amendments

- p.4, line 15: Since artificial intelligence systems are not generally "offered, sold, leased, [or] given," the following language should be added at the end of the line: "or otherwise impacts a consumer in the state"

- p. 5, lines 13-14: It is not clear what the exclusion "improve the result of a previously completed human activity" means. This should be removed from the exclusions or clarified.
- p. 6, line 18: An "intentional and substantial modification" should include any previously unassessed risk of algorithmic discrimination. The word "material" should be replaced with "previously unassessed."
- p. 9, lines 14-18 and p. 13, lines 26-30: These lines should be deleted. As explained above, a rebuttable presumption delays consumer relief and duplicates the work necessary to prosecute alleged algorithmic discrimination.
- p.12, lines 1-14 and p. 14 line 32 - p.15 line 11: NIST's Artificial Intelligence Risk Management Framework and ISO/IEC 42001 provide guidelines and best practices for managing risk and are intended as flexible frameworks, rather than a checklist. Similar to the rebuttable presumption, it would complicate investigations to establish a presumptive safe harbor.
- p. 12, lines 17-23: It should be clarified that "trade secret" cannot be used as a shield to hide information from the Attorney General during an investigation. In addition, the trade secrete exemption should be narrower.
- p. 21, lines 13-19: Violations of SB 936 should be linked to the Consumer Protection Act. Lines 13-19 should be deleted and replaced with the following language: "A violation of this subtitle: (1) is an unfair, abusive, or deceptive trade practice; and (2) except for the provisions of § 13-411 of the Commercial Law Article, is subject to the enforcement and penalty provisions contained in Title 13 of the Commercial Law Article."
- p. 22, line 4: It should be clarified that the Attorney General may require a developer or deployer to disclose any information that is necessary to assess compliance with the subtitle.
- p. 22, line 10: replace "shall" with "may" and the availability of the cure period should lapse October 1, 2027.

Accordingly, we urge the Finance Committee to issue a favorable report on SB 936 with the amendments discussed.

cc: Members, Finance Committee
        The Honorable Katie Fry Hester
        The Honorable Dawn Gile
        The Honorable Sara Love