April 9, 2024

TO: Members, Senate Judiciary Committee

SUBJECT: SB 1154 (HURTADO) CALIFORNIA PREVENTING ALGORITHMIC COLLUSION ACT OF 2024
OPPOSE – AS AMENDED MARCH 18, 2024
SCHEDULED FOR HEARING – APRIL 16, 2024

The undersigned organizations respectfully **OPPOSE SB 1154 (Hurtado)**, as amended March 18, 2024, enacting the California Preventing Algorithmic Collusion Act of 2024, as it is unnecessary, creates onerous reporting requirements, chills price competition by exposing businesses to significant uncertainty and aggressive liability, and imposes significant cost on all but the smallest of businesses using tools that fall under the bill's definition of price algorithms. Alarmingly, the bill also grants the Attorney General (AG) authority to request reports detailing a business's use of pricing algorithms for *any* reason, without regard to whether the business is alleged to have behaved anticompetitively or harmed consumers, and then permits the AG to share the report with a third party, NIST (the National Institute of Standards and Technology), to decipher the reported information.

First and foremost, this bill is wholly unnecessary because price collusion is clearly already illegal under current federal and state laws. Existing antitrust laws prohibit competitors from colluding through common use of a third-party company to set prices by improperly using competitively sensitive information from rivals, and the prohibition applies regardless of the form the alleged collusion takes. In other words, whether it is by salespeople conspiring or computers running algorithms, collusion is collusion. Indeed, the very circumstances that appear to have inspired federal bills on this topic (which **SB 1154** seems to track in large degree) have already been the subject of multiple litigations making their way through the courts and the U.S. Department of Justice's Antitrust Division recently joined the effort.

To be clear, the use of a pricing algorithm does not inherently constitute price *fixing*. Price algorithms are in fact extremely common, allowing businesses to save valuable resources by avoiding manual pricing while making prices more responsive to changes in supply and demand. Retailers use pricing algorithms to ensure they are offering the lowest prices to consumers. Realtors use them to help clients set home prices. Banks use them to set terms (e.g. rates and fees) for services. Hospitality, airlines, transportation network companies, utilities, ticket venues, and many others use them for dynamic pricing. The list goes on.

If enacted, **SB 1154's** reliance on incredibly broad, ill-defined terms and ambiguous standards will invariably muddy the distinction between permissible pricing algorithms and price fixing, creating significant confusion for businesses. For one thing, the definition of "pricing algorithm" is so overly broad and vague that it captures *any* algorithm that uses a computational process. For another, **SB 1154** prohibits the use or distribution of any "pricing algorithm" that uses, incorporates, or was trained on "nonpublic competitor data." "Nonpublic competitor data", however, is not actually limited to nonpublic information. Rather, even the use of a competitor's *public* prices could be deemed "nonpublic competitor data" if the data is later determined to have not been "widely available" or "easily accessible" to the public. Of course, what is considered widely available or easily accessible to the public is entirely unclear. These are just two (of many) examples of definitional defects with language in the proposed bill. Despite this glaring lack of clarity, **SB 1154** nonetheless imposes an incredibly aggressive $10,000 per day penalty for violations, plus the sum of the price of each product or service sold using the pricing algorithm, in civil actions brought by the Attorney General (AG). Such uncertainty combined with significant liability exposure will invariably chill price

competition and squelch the continued use of industry standard algorithms that aid businesses in ensuring accurate pricing and avoiding the potential for price gouging.

SB 1154 additionally creates the presumption that a business has engaged in certain illicit activities, including that the business entered into a contract in restraint of trade, if it: (1) distributes a pricing algorithm to two or more persons with the intent that it be used to set or recommend a price or commercial term of a product or service in the same market or a related market, and two or more persons use the pricing algorithm to do so; or (2) uses a pricing algorithm to set or recommend a price or commercial term of a product or service and the pricing algorithm was used by *another* person to set or recommend a price or commercial term of a person in the same market or a related market (i.e., where there was no intent by the first business). To rebut this presumption, the business must not only show that it did not develop or distribute the pricing algorithm, but it must also demonstrate, by clear and convincing evidence, that the business neither knew, nor could it have reasonably known, that the pricing algorithm used "nonpublic competitor data." Given that a business may not know until after the fact that the public information used was not widely known or easily accessible, rebutting these presumptions becomes incredibly challenging and highly unlikely.

Furthermore, if a business has annual revenues greater than $5 million and uses pricing algorithms to set a price or commercial term, **SB 1154** requires that it also comply with certain disclosures that can be rather cumbersome to provide, particularly for smaller businesses, and that create liability exposure. While the disclosures must be made "in a clear manner" for a business to be considered compliant, nothing in the bill provides clarity as to what is and is not considered clear for purposes of compliance[1]. Any failure to meet this requirement will automatically constitute an unfair trade practice subject to monetary penalties of $5,000 for each day the violation occurs or continues to occur and/or injunctive or "other equitable relief". Meaning, it is possible that a business provides the disclosure in a manner that it believes is clear, but if the AG disagrees, the business will have violated the law. As a result of such confusion and liability exposure, businesses will likely restrict their use of pricing algorithms, which will undermine the benefits for businesses and consumers alike.

Lastly, if the significant legal and administrative compliance costs and liability risks were not sufficiently problematic, **SB 1154** also authorizes the AG to demand that any business using pricing algorithms turn over potentially sensitive and valuable trade secret and competitive information, without any showing of illegal activity or even reasonable cause to believe there has been illegal activity. These reporting requirements are quite onerous, not to mention legally problematic insofar as they require a business to state if it engages in price discrimination, certified under penalty of perjury by the company chief executive officer, chief economist, chief technology officer or corporate officer of similar authority. Even though all the information in the report is seemingly exempted[2] from the Public Records Act to quell concerns around the disclosure of trade secrets and the potential use of such reports as litigation bait, nothing in the bill precludes the AG from wielding its authority to demand compliance and effectively conduct a fishing expedition.

Therefore, because the bill imposes significant liability on businesses for failing to comply with overbroad, vague, and onerous requirements relating to widely used tools, and because it will undoubtedly have a sweeping, chilling effect on price competition among businesses across all industries as a result, we strongly **OPPOSE SB 1154 (Hurtado)**.

Sincerely,

Ronak Daylami
Policy Advocate
on behalf of

[1] Concerns about the appropriate manner of disclosure are further compounded by the lack of clarity surrounding the term "nearly identical products or services" in subsection (b)(1)(A).
[2] *Seemingly*, because the bill states that the information in subdivision (a) if the proposed section 17372 is exempted, whereas the details of the report are identified in subdivision(b) of that section.

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California Credit Union League, Emily Udell
California Fuels & Convenience Alliance, Jack Yanos
California Retailers Association, Ryan Allain
Chamber of Progress, Leah Barros
Insights Association, Howard Fienberg
Los Angeles Area Chamber of Commerce, Chris Micheli
Software & Information Industry Association, Anton Van Seventer
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