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***Testimony in support of L.D. 1977, An Act to Create the  
Data and Privacy Protection Act***

Senator Carney, Representative Moonen, and honorable members of the Joint Standing Committee on Judiciary, my name is Aaron M. Frey, and I have the privilege to serve as Maine's Attorney General. I am here today to testify in general support of L.D. 1977, *An Act to Create the Data Privacy and Protection Act*.

We live in a world in which it is becoming increasingly difficult to protect our privacy. Some of our most private and sensitive information is now being harvested, dissected, and sold as a commodity. Consumers are often unaware that this is happening. And even when they are aware, it is difficult, if not impossible, for them to stop it. My office strongly supports legislation that will provide meaningful protection to consumers and allow them to exercise real control over the use of their personal information.

It is clear that this proposal was built upon a consumer-protective foundation. It has many excellent features and does not have some of the concerns that caused me to testify in opposition to a different privacy bill – L.D. 1973. In contrast to L.D. 1973, L.D. 1977 allows for private enforcement actions, does not give businesses a right to cure (which essentially allows businesses to violate the law with impunity and then only comply after they are caught), and permits my office to develop necessary rules interpreting and implementing a very complex piece of legislation. Further, L.D. 1977 would not repeal current law regulating the extent to which Internet Service Providers (“ISPs”) may use, disclose, and sell their customers’ personal information. *See* 35-A M.R.S. § 9301. ISPs occupy a unique place in the online ecosystem because they function as the onramps to the Internet and can collect vast amounts of information regarding their customers’ online activity. The ISP law should remain in place, regardless of whether additional broader privacy legislation is enacted.

While we are supportive of L.D. 1977’s objectives, we have carefully reviewed it and identified various areas where additional work would be helpful. Some of these areas are as follows:

- Various terms used in the bill should be defined, such as “authenticate,” “collect,” “transfer,” “derived data,” “process,” “processing purpose,” “publicly available information,” and “reasonably understandable.”

- Consideration should be given to the extent to which information collected by health care providers should be exempted.
- The bill includes as “sensitive data” “information identifying an individual’s online activities over time and across 3<sup>rd</sup>-party websites or online services.” It is not clear to us whether this would provide sufficient protection of a consumer’s web browsing history.
- “Small businesses” are exempt from some of the bill’s requirements. Consideration should be given as to whether the threshold for being considered a “small business” is too high.
- The bill permits transfer of sensitive information to third parties when necessary to comply with state law. This should be limited to Maine law to avoid situations in which entities turn over sensitive information in support of enforcement actions in other states for conduct which is legal in Maine (for example, accessing reproductive health services). It should be further limited to legal requirements in effect at the time the sensitive data was collected and notice should be provided to the affected individual.
- Provisions regarding privacy policies should be amended to ensure that privacy policies are understandable and provide sufficient detail regarding the types of third parties to which entities transfer covered data.
- As written, Section 9604, addressing actions regarding covered data, is somewhat confusing and could be restructured to provide better clarity.
- Some entities offer reduced pricing or other benefits in exchange for consumers waiving their privacy rights. As a matter of social justice, it is important to ensure that privacy protections are available not just to those who can afford them. While L.D. 1977 attempts to address this issue, it prohibits differential pricing that is “unjust, unreasonable, coercive or usurious in nature.” It also has exceptions that could provide loopholes, such as participation in a “bona fide loyalty, rewards, premium features, discount, or club card program.” We recommend strengthening this provision to ensure that all individuals, regardless of their economic means, receive meaningful privacy protections.
- Section 9611, which addresses the ability of individuals to obtain access to information regarding them held by a covered entity, should be expanded to include publicly available information the entity holds and the reasons the entity believes it is publicly available. It should also require covered entities to disclose the sources from which information was collected.
- Consideration should be given to an appeal process if a covered entity denies an individual’s request to obtain access to information about the individual held by the entity.

- We recommend that covered entities and service providers be required to provide the Attorney General with any data security assessments they have conducted and to retain such assessments for at least five years.
- Consideration should be given to authorizing the award of liquidated damages or a specified monetary penalty in civil actions brought by individuals.
- Because of the complexity of the bill, there are some provisions that are confusing or could be misinterpreted. For example, one provision might suggest that information collected for a valid reason (such as maintenance of the service) can then be used for a different purpose (such as targeted advertising).

The above is not exhaustive but instead is illustrative of many of the areas in which we believe additional work would result in a stronger piece of legislation. Given the complexity of the statute, that work may turn out to be significant and will need to involve all relevant stakeholders. I want to thank Representative O'Neil for bringing this bill forward, and I look forward to working with the Committee to advance the goals of L.D. 1977.