**COST DRIVER**

April 15, 2025

TO: Members, Senate Judiciary Committee

**SUBJECT: SB 384 (WAHAB) PREVENTING ALGORITHMIC PRICE FIXING ACT: PROHIBITION ON PRICE-FIXING ALGORITHM USE**
**OPPOSE/COST DRIVER– AS AMENDED APRIL 8, 2025**
**SCHEDULED FOR HEARING – APRIL 22, 2025**

The California Chamber of Commerce and the undersigned are **OPPOSED** to S**B 384** (Wahab) as introduced on February 14, 2025, as a **COST DRIVER** because it effectively prohibits a business from using any information related to pricing or supply to make pricing or production decisions with pricing algorithms or other software under the guise of prohibiting price fixing. At its core, **SB 384** prohibits businesses from using any software, systems, or processes that create pricing models to set a price or supply level of a good or service – banning the use of the technology in competitive pricing. In other words, this bill does precisely what the business community has cautioned against over the last two years when it comes to AI legislation: it regulates the technology itself rather than its misuse, which will in no uncertain terms stifle innovation and cause significant damage to California's economy, hurting small businesses the most, and Californians along the way. Moreover, the ability to analyze public pricing data has long been a lawful and essential business practice. To now prohibit the use of technology to perform the same function as humans is rather arbitrary and will only create less competition as opposed to more.

Like several other pricing algorithm bills moving through the Legislature, **SB 384** appears rooted in an assumption that pricing algorithms are inherently problematic or unlawful, as opposed to attempting to identify and halt demonstrably anti-competitive behaviors or *price-fixing* practices. Pricing algorithms are, in fact, extremely common tools that enable businesses to reduce costs, improve efficiency by avoiding manual pricing, dynamically adjust prices in response to market conditions and changes in supply and demand (including to decrease prices), and ultimately reduce costs to consumers as well – and they can do so without involving any anticompetitive conduct.

In contrast, price collusion (or price fixing) is problematic and is clearly illegal under current federal and state laws. Indeed, existing antitrust laws prohibit competitors from colluding on pricing any manner, whether through using a pricing algorithm or otherwise. **In other words, whether a price-fixing conspiracy is hatched by salespeople conspiring or computers running algorithms, collusion is collusion and is already covered effectively by existing law. To be clear, however, the use of a pricing algorithm does not inherently constitute price *fixing*.**

Retailers use pricing algorithms to ensure they are offering the most competitive 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.

Thus, legislation such as **SB 384** will merely remove a valuable tool for setting dynamic pricing and impose significant costs on all businesses who use price algorithms – especially smaller businesses – thereby reducing competition, rather than promoting it. In the end, this bill hurts not only businesses, taking them back to pre-technological times, but it will hurt consumers, effectively doing away with price-comparison shopping and competitive/dynamic pricing by businesses.

**How public pricing is used to make pricing decisions**

The fundamental concern we have with **SB 384** is that it prohibits the use of certain technology in competitive pricing under the guise of prohibiting price fixing. Under the introduced version of the bill, it very clearly did so by prohibiting any business from using pricing models of any sort to set a price or supply level of a good or service based on *any* information related to pricing or supply – whether that information was publicly available or nonpublic/confidential. That distinction between publicly available and nonpublic or confidential information is significant, because it preserves activities that businesses long performed in making pricing decisions, and done so legally: observe, analyze, and respond to market conditions; collect information on prices, price changes, and supply levels; analyze/process that information; and create pricing models to inform pricing decisions.

It is worth noting that there are many legitimate grounds for setting different prices for the same goods or services, such as dynamic pricing where prices fluctuate based on real-time demand, availability and market conditions (e.g., peak hours or bad weather can drive up demand for rides); local demand or operational/regional costs; returning customers or those enrolled in loyalty programs may receive lower prices; or lower prices may get set to attract first time customers; online ticket prices may increase as the date of an event gets closer; inventory goes down; etc.). Restricting the ability of businesses to use this type of technology to help them in these same activities will greatly impair the ability of some businesses to understand market conditions and respond efficiently in changes to the competitive landscape, not to mention take away information that would otherwise guide pricing decision and lend to less competitive pricing overall.

While we appreciate the author's willingness to narrow the bill by removing reference to public databases and narrowing the bill to nonpublic data of two or more sellers, to truly avoid capturing public data and to avoid the chilling effect that this blanket ban will have on the use of this technology in general, the line between what is public and nonpublic data needs to be more clearly and accurately drawn and actual knowledge of the sellers should be considered, or the end result will remain the same as it was under the introduced version of the bill. As currently drafted however, our original concerns, largely remain, as further explained below.

**Recent amendments fail to adequately address concerns that SB 384 effectively ban the use of information related to pricing or supply to set competitive pricing with technology**

As amended April 8th, **SB 384** still bans a person from using specific technology classifies as a "price-fixing algorithm" to set a price or supply level of a good or service and now also extends the prohibition to apply to setting a rent or occupancy level of rental property as well. The bill defines "price-fixing algorithm" as a software, system, or process that both: (1) accepts the historical or contemporaneous nonpublic input data of two or more sellers on the price, price change, or supply level of a good or service or rent or occupancy level of rental property from one or more sellers; and, (2) processes such nonpublic data for the purpose of producing a pricing or rental strategy. While certainly, any collusion should be – and is, under existing law – unlawful, the problems here turn in large part around two issues (liability aside): accurately narrowing the bill to nonpublic data, and nonpublic data only; and the knowledge or intent of the "sellers" held liable.

Notably, the April 8th amendments have altered the scope of "pricing algorithms" that are subject to this broad prohibition in a number of important ways that ultimately do not adequately address the fundamental issues with this bill, and the likely outcomes for businesses and consumers alike.

First, it expands the definition to also now include any "algorithmic program, or artificial intelligence" (AI) that does the same, with AI being defined very broadly and "algorithmic program" not being defined at all.

It is also worth noting that the definition was already broad with the inclusion of "software, systems, or *process*", and it has only become that much broader with the deletion of any reference to models. Businesses have a lot of *processes* and the majority of them are not algorithmic.

Second, it narrows the scope of "pricing algorithms" subject to this otherwise broad ban by striking the express reference to "public databases".

Third, instead of capturing any algorithm that "collects historical or contemporaneous information of two or more sellers" it focuses on any algorithms that "accepts the historical or contemporaneous *nonpublic input data* of two or more sellers on the price, price changes, or supply level of a good or service". In turn, "nonpublic input data" is defined as data that is "competitively sensitive, including but not limited to price, output, customers, or sales territory."

This particular definition is instrumental to understanding why the April 8th amendments do not have the intended narrowing effect: by using terms such as *nonpublic* and *competitively sensitive*, but then immediately following them with others such as *price, customers,* or *sales territory*, **SB 384**, as amended, sends conflicting messages. It simultaneously appears to limit the scope of its prohibited technologies to those that are accepting non-publicly facing information but then expands it to once again capture information that is likely to be publicly available or public facing.

Consider the inclusion of *price*: a price (as opposed to internal pricing models, pricing strategies, negotiated prices) most commonly infers information that is usually made available to the general public, such as advertised or quoted prices or sales listings. In some instances, *sales territory* can also be publicly available as well. This might be the case, where it can be easily inferred from market behavior or external documentation, such as where a company publicly lists their regional representatives. Even with *customers*, the information is not automatically nonpublic data or competitively sensitive, though it certainly can be. But it could be anonymized and aggregated to provide market analytics about a company's customer base that might not be nonpublic/sensitive. Or it can be nonpublic/sensitive in specialized markets where customer identity is public knowledge within the industry. Consider companies that exclusively supply parts for the aerospace industry. As for *output*, the bill is entirely unclear what that means.

Moreover, the bill fails to acknowledge that the "seller" using the "price-fixing algorithm" [Proposed Section 22949.85 Proposed Section 22949.85(c)(4)] is not necessarily one of the two sellers whose nonpublic data is used in the pricing algorithm [Proposed Section 22949.85(c)(2)] and therefore neither intends to use, nor has knowledge of the fact that they would be using a "price-fixing algorithm" that accepted the nonpublic input data of two or more sellers (if for no other reason than the party offering the tool to them is not going to advertise it to them as "price fixing"). Yet under the vague drafting of the bill, it is unclear if it is the unknowing seller using the system, or the parties with the intent to feed nonpublic input data into the system and to provide that information to other sellers, or both, who would be subject to liability under Proposed Section 22949.85(b) (discussed further, below). This will very clearly chill the use of this technology unless a business has the sophistication or funds to develop these tools internally and avoid even using anything other than data off public databases – even if it is aggregate and anonymized market data – on the off chance that the information used is classified as "nonpublic data".

Again, while improper use of proprietary or unlawfully obtained nonpublic data can raise legitimate concerns, gathering and analyzing public market data has long been recognized as lawful and beneficial to competition. Using historical or contemporaneous information on a price, price change, or supply level of a good or service that is not otherwise nonpublic data, and that does not otherwise constitute or facilitate collusion, should be treated no differently simply because an algorithm is being used to help set the price. And that is nothing to say of a business's First Amendment right to use information that is in the public domain, which is also infringed upon when restricting the use of public data.

Prohibiting otherwise lawful activity simply because an algorithm is being used to help set the price, while still allowing it for human decision-making creates an arbitrary and inconsistent distinction between lawful and unlawful pricing setting practices that simply disfavors businesses that rely on automated tools without

adequate justification. In fact, removing this tool would disproportionately harm smaller businesses, which rely on automation to compete with larger firms that have greater resources and market intelligence.

**Liability provisions are vague, potentially devastating and likely to have chilling effect on the use of this technology**

Lastly, we note that **SB 384** permits the AG, city attorney, or county counsel to file a civil action for a violation of this section for any or all of the following: damages, injunctive relief, restitution, or civil penalties of up to $1,000 per violation – without defining what constitutes a single violation. The bill also mandates courts to award reasonable attorney's fees and costs to the AG, city attorney, or county counsel, to the government plaintiff if they prevail.

Not only are the varying damages and fines cumulative, but the bill is also vague and fails to specify the type(s) of damages that can be assessed. As drafted, it is unclear if the intent is to capture actual damages only, general damages, punitive, or some other variation(s). Such an open-ended and unclear liability structure combined with severe penalties creates significant legal uncertainty for businesses, and the cumulative financial liability could be particularly devastating for smaller businesses. The chilling effect on price competition would be widespread, ultimately harming consumers by reducing pricing transparency and flexibility and potentially raising prices.

In sum, by banning a widely used pricing tool, **SB 384** will hinder innovation, disadvantage small businesses, and increase costs for consumers, unfairly penalizing businesses for using technology to engage in the same lawful pricing strategies that businesses have long performed. Because the bill will undoubtedly have a sweeping, chilling effect on price competition among businesses across all industries, instead of preventing, anticompetitive behaviors in the market, we must strongly **OPPOSE SB 384 (Wahab)** as a **COST DRIVER**.

Sincerely,

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Policy Advocate
on behalf of

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Association of National Advertisers, Travis Frazier
California Chamber of Commerce, Ronak Daylami
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