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State of California
DEPARTMENT OF JUSTICE



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August 22, 2018

The Honorable Ed Chau
California State Assembly
State Capitol
Sacramento, CA 95814

The Honorable Robert M. Hertzberg
California State Senate
State Capitol
Sacramento, CA 95814

RE: California Consumer Privacy Act of 2018

Dear Assemblymember Chau and Senator Hertzberg:

As you work your way toward a fruitful conclusion to the legislative session, I write to reemphasize what I have expressed previously to you and our legislative leaders and Governor Brown concerning the recently enacted California Consumer Privacy Act of 2018 (CCPA). I appreciate your leadership and share your commitment in protecting consumer privacy and the goals of the CCPA. However, as I have warned before, the CCPA imposes several unworkable obligations and serious operational challenges upon the Attorney General's Office (AGO), the agency charged with its oversight and enforcement. And, as I have stressed on numerous occasions, failure to cure these identified flaws will undermine California's authority to launch and sustain vigorous oversight and effective enforcement of the CCPA's critical privacy protections.

Let me set forth again the AGO's five primary concerns with the existing language in the CCPA. First, section 1798.155 of the CCPA requires the AGO to provide opinions to "[a]ny business or third party" as well as warnings and an opportunity to cure to a business before the business can be held accountable for a violation of the CCPA. Requiring the AGO to provide legal counsel at taxpayers' expense to all inquiring businesses creates the unprecedented obligation of using public funds to provide unlimited legal advice to private parties. This provision also creates a potential conflict of interest by having the AGO provide legal advice to parties who may be violating the privacy rights of Californians, the very people that the AGO is sworn to protect. What could be more unfair and unconscionable than to advantage violators of consumers' privacy by providing them with legal counsel at taxpayer expense but leaving the victims of the privacy violation on their own? I do not see how the AGO can comply with these requirements. I urge you to swiftly correct this.

Second, the CCPA's civil penalty provisions are likely unconstitutional. These provisions (see Civil Code section 1798.155 and 1798.160) purport to amend and modify the Unfair Competition Law's (UCL) civil penalty provision (see Business and Professions Code section 17206) as applied to CCPA violations. The UCL's civil penalty provisions were enacted by the voters through Proposition 64 in 2004 and cannot be amended through legislation (see Cal.

August 22, 2018
Page 2

Const. art. II, § 10). We can and should address this constitutional infirmity by simply replacing the CCPA's current penalty provision with a conventional stand-alone enforcement provision that does not purport to modify the UCL. My team has offered corrective language for this purpose.

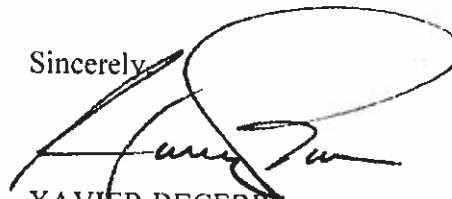
Third, the CCPA contains an unnecessary requirement that private plaintiffs give notice to the Attorney General before filing suit (see Civil Code section 1798.150, subdivision (b)(2)). This provision has no purpose as the courts not the Attorney General decide the merits of private lawsuits. Additionally, the filing of a private action does not limit the Attorney General's law enforcement authority. This provision in the CCPA imposes unnecessary personnel and administrative costs on the AGO and it, too, should be eliminated.

Fourth, under the CCPA, the AGO has one year to conduct rulemaking for this newly established body of law (see Civil Code section 1798.185, including at subdivisions (a)(3), (4), (6), and (7)). But the CCPA provided no resources for the AGO to carry out this rule-making – or even its implementation thereafter. The nature and pace of the rule-making process, especially in light of the broad public interest in privacy issues, does not lend itself to a short-circuited timeframe to formulate the rules that will govern the oversight and enforcement of the CCPA's privacy rights. A one-year deadline to establish implementing regulations for the CCPA are simply unattainable: regulations of this magnitude require time – more than one year; the AGO has received no resources for this purpose; and it must be recognized that the AGO is being asked to take on the new role and obligations of a regulator (the AGO's role has been and is that of an enforcer). The Attorney General's Office must be given a sufficient and realistic amount of time to issue strong, enforceable regulations.

Finally, the CCPA does not include a private right of action that would allow consumers to seek legal remedies for themselves to protect their privacy. Instead, the Act includes a provision that gives consumers a limited right to sue if they become a victim of a data breach. The lack of a private right of action, which would provide a critical adjunct to governmental enforcement, will substantially increase the AGO's need for new enforcement resources. I urge you to provide consumers with a private right of action under the CCPA.

Providing Californians with privacy protections is critically important now more than ever. However, the CCPA as it currently applies to the Attorney General's Office presents unworkable obligations and serious operational challenges. If we fail to address these issues with the CCPA as outlined above, it is the people of California who stand to lose.

Sincerely,



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August 22, 2018
Page 3

CC: Speaker Anthony Rendon
Senate Pro Tem Toni Atkins
Senator William Dodd