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Assemblymember Ed Chau, Chair
Assembly Privacy and Consumer Protection Committee
State Capitol, Room 5016
Sacramento, CA 95814

Re. California Consumer Privacy Law Corrections

Dear Chairman Chau,

As one of the principal commentators, scholars, teachers and advisors on California privacy law, I want to first congratulate you and the California Legislature on the passage of many innovative and cutting-edge information privacy and security laws over the years, making California one of the leading jurisdictions globally, as I frequently note in my publications and presentations.

To maintain this leadership position, I respectfully recommend that you and your staff consider advancing a number of technical corrections to the California Consumer Privacy Act of 2018 ("CCPA") and to other California privacy laws that have become obsolete or redundant due to the passage of the CCPA. In making these recommendations, I do not mean to comment on any bills or proposals intended to substantively modify the CCPA.

What I do propose in this letter are strictly technical corrections that are urgently necessary: necessary to rationalize and harmonize California's myriad privacy statutes; necessary to keep California in its leadership role as one of the most advanced and innovative jurisdictions worldwide when it comes to information technologies and privacy laws; necessary to make a compelling case against broad federal statutory preemption; necessary to allow businesses to understand and comply with applicable law; and necessary to achieve the very purpose of privacy laws – to protect the personal information of the people of California. I would welcome an opportunity to meet with your staff to go over my proposals.

First, the California Legislature *should correct all remaining typographical and other manifest errors in the CCPA* (the presence of which is understandable given the fast track legislative history and ballot initiative background), including the following:

- Cal. Civ. Code §1798.100(e) and Cal. Civ. Code §1798.110(d)(1) should be deleted as they contradict the remainder of the CCPA. These sections each state "This section shall not require a business to retain any personal information," but no provision of the CCPA requires any business

to retain any information, and the general approach of the CCPA is to encourage minimization of information collection/retention.

- In Cal. Civ. Code §1798.105(d)(1), the words "perform actions that are" should be inserted immediately before the words "reasonably anticipated."
- Cal. Civ. Code §1798.110(c)(5) states, "A business that collects personal information about consumers shall disclose, pursuant to subparagraph (B) of paragraph (5) of subdivision (a) of Section 1798.130: The specific pieces of personal information the business has collected about that consumer." In the interest of data privacy, "specific pieces of information" should not be disclosed in an online privacy policy, on the website of a company, but rather only "categories" of personal information as contemplated in 1798.110(c)(1). Accordingly, subsection 1798.110(c)(5) should be deleted.
- Cal. Civ. Code §1798.120(c) states "... the consumer is less than 16 years of age, unless the consumer, in the case of consumers between 13 and 16 years of age" This results in an inconsistent rule for 16 year-olds, which could be avoided by revising the clause to read "consumer who is at least 13 but not yet 16 years of age."
- In Cal. Civ. Code §1798.125(a)(2) and (b)(1) "... value provided to the consumer by the consumer's data" should be corrected to read "... value provided to the business by the consumer's data."
- The reference in Cal. Civ. Code §1798.140(b) to "an individual's deoxyribonucleic acid (DNA)" is erroneous because DNA is not data but rather human material from which data can be obtained. This error could be corrected by deleting this reference, as information about DNA is covered sufficiently by other categories as "personal information."
- Cal. Civ. Code §1798.140(d)(7): The words "manufactured for" should be deleted from the phrase, "that is owned, manufactured, manufactured for, or controlled by the business."
- Cal. Civ. Code §1798.140(k): The definition of "Health insurance information" should be deleted as this term is not used elsewhere in the CCPA.
- In Cal. Civ. Code §1798.140(o)(2), the sentence, "'Publicly available' does not include consumer information that is deidentified or aggregate consumer information" should be corrected by replacing the term "Publicly available" with the term "Personal information."
- Cal. Civ. Code §1798.140(s)(9): In the sentence, "Subjected by the business conducting the research to additional security controls limit access to the research data to only those individuals in a business as are necessary to carry out the research purpose," the word "that" should be inserted immediately before the word "limit."
- Cal. Civ. Code §1798.140(o)(2) reads, "For these purposes, 'publicly available' means information that is lawfully made available from federal, state, or local government records, if any conditions associated with such information." The last phrase ("if any ...") is incomplete and should be deleted.
- Cal. Civ. Code §1798.145(a)(6): The last sentence (including "shall not permit a business from storing") should be deleted.
- In Cal. Civ. Code §1798.145(c)(1)(B), the term "patient information" should be replaced by the term "personal information." If a business voluntarily protects any personal information as if it were subject to the strict rules of HIPAA or CMIA, it should not also have to comply with the CCPA. Also, the term "patient information" is not defined.

Second, *the California Legislature should consider repealing or updating all other California privacy laws that the CCPA subsumes*, including the following:

- Cal. Civ. Code § 1798.83 (Shine the Light) contains different disclosure requirements, definitions and specifications for website privacy policies, link placement and exceptions, which are now subsumed by the broader regime established by the CCPA.
- Cal. Bus. & Prof. Code §§ 22575–22579, the California Online Privacy Protection Act (CalOPPA), prescribes different disclosure requirements, definitions and rules for online privacy policies, which are subsumed by the CCPA (applicable offline and online).
- Cal. Bus. & Prof. Code § 22584 and § 225845, the Student Online Personal Information Protection Act (SOPIPA) and the Early Learning Personal Information Protection Act (ELPIPA) protect the privacy of minors through disclosure and consent requirements, which are now subsumed by the CCPA's requirements for parental consent and opt-in consent from minors up to age sixteen.
- Cal. Civ. Code § 1749.60, *et seq.*, the Supermarket Club Card Disclosure Act of 1999, imposes restrictions on the sale of personal information collected by supermarkets in the context of loyalty cards. Such restrictions are subsumed by the broader CCPA.
- The definitions, scope, requirements and liability provisions in Cal. Civ. Code §1798.82 (the existing breach notification law), Cal. Civ. Code §1798.90.5 (existing rules for automated license plate scan data bases) and Cal. Civ. Code §1798.150 (CCPA liability provision) should be harmonized and streamlined to help businesses understand and comply with these related obligations.

For privacy advocates and lawmakers, it is more exciting to create new privacy laws than to revise the existing statutes. For businesses and other organizations, however, it is increasingly difficult or impractical to keep track of California's numerous privacy laws (in addition to laws of other states and countries). For better or worse, the CCPA is extremely broad and prescriptive. Companies that establish compliance with the CCPA over the next year should not also be required to analyze and apply additional California privacy laws with overlapping, inconsistent or outdated requirements pertaining to the collection and sharing of personal information. The best way to ensure that organizations follow California's new privacy laws is to make compliance with those laws as simple as possible. Investing in a measure of code clean-up would materially assist them in that new compliance challenge.

Please let me know if you have any questions or if I can be of any assistance. I am submitting this letter on my own behalf, not on behalf of my law schools, law firm, clients or others.

Best regards,



Lothar Determann

Attachments, separately submitted:

- biographical information
- publications

LOTHAR DETERMANN BIOGRAPHY

Prof. Dr. Lothar Determann teaches and practices international data privacy, technology, commercial and intellectual property law.

He has been a member of the Association of German Public Law Professors since 1999 and teaches Data Privacy Law, Computer Law and Internet Law at Freie Universität Berlin (since 1994), University of California, Berkeley School of Law (since 2004), Hastings College of the Law (since 2010), Stanford Law School (2011) and University of San Francisco School of Law (2000-2005). He has introduced and first taught courses on privacy law at three law schools in California, including a course specifically dedicated to California Privacy Law at Hastings College of the Law.

He has authored more than 120 articles and treatise contributions as well as 5 books, including Determann's Field Guide to Data Privacy Law (3^d Edition, 2017, also available in Chinese, German, Japanese and Russian) and California Privacy Law - Practical Guide and Commentary (3^d Ed. 2018), which covers every California and U.S. Federal data privacy law.

At Baker & McKenzie LLP in San Francisco and Palo Alto, he has been counseling companies since 1998 on data privacy law compliance and taking products, business models, intellectual property and contracts international. Admitted to practice in California and Germany, he has been recognized as one of the top 10 Copyright Attorneys and Top 25 Intellectual Property Attorneys in California by the San Francisco & Los Angeles Daily Journal and as a leading lawyer by Chambers, Legal 500, IAM and others. For more information see www.bakermckenzie.com.