April 2, 2019

Senator Hannah-Beth Jackson
State Capitol, Room 2032
Sacramento, CA 95814

Dear Senator Jackson:

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies, from small businesses, to household brands, across every segment of the advertising industry, including a significant number of California businesses. Our members engage in responsible data collection and use that benefit consumers and the economy.[1] We strongly support the objectives of the California Consumer Privacy Act ("CCPA"), and we believe privacy deserves effective protection in the marketplace.

We provide this letter to explain our concerns surrounding legislation you recently introduced to amend the CCPA, Senate Bill 561.[2] While we agree that certain parts of the CCPA must be amended or clarified to ensure consumer privacy is advanced, we believe that the practical results of Senate Bill 561 will fall short of this goal. The bill would substantially expand the private right of action provision to cover any violation of the CCPA without requiring a consumer to suffer any harm as a condition of bringing suit. The bill also would remove businesses' incentive to remediate and rectify alleged violations by doing away with the CCPA's 30-day cure period. Finally, the bill would strike the provision of the law that allows businesses to seek compliance advice from the California Attorney General, thereby eliminating an important source of compliance guidance for businesses to ensure they are meeting the requirements and furthering the detailed and complex provisions of the CCPA.

We believe that Senate Bill 561's substantial changes to the CCPA will reduce rather than advance consumer privacy by making compliance activities more difficult and more litigious, while diverting significant resources away from consumer protection. As a result, we urge you to reconsider supporting these changes to the law. We would be pleased to work with your office on our joint goal of fixing problems with the CCPA to further advance consumer protections.

I. The Private Right of Action in the Amendment Would Allow for Lawsuits from Plaintiffs Who Have Suffered No Injury, Creating a Complex and Flawed Compliance System Without Tangible Benefits for Consumers

Senate Bill 561 would significantly expand the CCPA's private right of action provided in Sec. 1798.150(a) to any violation of the CCPA. This approach will create a complex and flawed compliance system without tangible benefits for consumers. The problems with the

[1] John Deighton, *Economic Value of the Advertising-Supported Internet Ecosystem* (2017) available at https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-2017-FINAL2.pdf.

[2] S.B. 561, 2019-2020 Reg. Sess. (Cal. 2019).

expanded coverage of private right of action authority in the CCPA are also significantly magnified by the fact that the proposed language would not require a consumer to suffer any harm as a condition of invoking this right. The lack of a harm standing requirement in the amendment is out of line with existing California law regulating fair business practices and could improperly embolden plaintiffs to file frivolous lawsuits, which will burden and tie up California state courts.

If enacted, the bill would contradict law that is already in place regulating business and competition in California. In 2004, California passed Proposition 64 to amend the state's unfair competition law so that consumers had to suffer harm to have standing to bring suit for violations of the law.[3] The amendment limited the ability of plaintiffs to bring a lawsuit under California's unfair competition statute to instances where the plaintiff "has suffered injury in fact and has lost money or property as a result of the unfair competition."[4] An official voter information guide from the California government on Proposition 64 noted that requiring individuals to suffer injury to bring suit "closes a loophole" allowing for "frivolous shakedown lawsuits against small businesses" and "stops lawyers from pocketing most of the settlements."[5] The problems that California's Proposition 64 sought to correct are compounded by Senate Bill 516. Without a requirement to suffer some harm or injury from a violation of the CCPA, there will be nothing to stop individuals and plaintiffs' attorneys from filing frivolous lawsuits against companies for violations that have no impact on privacy.[6]

The private right of action proposal also could encourage plaintiffs to file suits that may conflict with the Attorney General's interpretation of the law. Such a compliance system would result in a chaotic proliferation of burdensome or conflicting cases which, in turn, would be a drain on all parties and detract from funds that businesses could otherwise allocate to developing CCPA compliance processes, procedures, and plans. Limiting the bill to government enforcement would also give government entities the ability to develop coherent interpretations of the law in the early years following its enactment.

As a result, we ask that you reconsider the expansion of the private right of action and the lack of a harm standard in Senate Bill 561.

II. Without a Cure Opportunity, Businesses Will be Less Incentivized to Fix Violations

Senate Bill 561 would remove a business's ability to appropriately cure potential violations of the CCPA and, where successful, avoid the threat of penalties under the CCPA.

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[3] Cal. Prop. 64, approved Nov. 2, 2004.

[4] *See* Cal. Bus. & Prof. Code § 17204.

[5] California Secretary of State, *Official Voter Information Guide, California General Election* 6 (Nov. 2, 2004), available at https://vig.cdn.sos.ca.gov/2004/general/english.pdf.

[6] The lack of a harm requirement in the CCPA also is inconsistent with constitutional standing requirements. The United States Supreme Court recently reaffirmed in *Spokeo, Inc. v. Robins* that a consumer must suffer injury in fact that is both concrete and particularized to have standing to bring a lawsuit in court. 136 S. Ct. 1540, 1548 (2016).

This proposed change in the CCPA will clearly substantially increase litigation and challenges to the law. It also will seriously diminish strong incentive for businesses to quickly cure possible compliance violations. The CCPA currently allows businesses to avoid penalties if they fix alleged violations within 30 days after receiving notice of a violation.[7] This provision gives businesses the opportunity to take timely remedial action to address their privacy practices if they are not in line with what the law requires. It therefore incentivizes businesses to act quickly to meet the CCPA's requirements upon notice of a violation. Without a cure period, and given the precedent-setting and complex nature of the law, businesses will be more likely to seek court review on how to fairly implement the law's intricate provisions rather than accept potentially record levels of fines for alleged violations. Scores of questions have already been raised about how various provisions of the CCPA impact different sectors of the economy, existing data flows that consumers expect, and data management practices. In these circumstances a cure period is not only appropriate but needed for consumers and businesses alike to have a common understanding of how the law works in practice.

The CCPA's cure period also is in line with other California laws, such as the California Online Privacy Protection Act ("CalOPPA"), a statute requiring businesses to make certain disclosures in their online privacy policies.[8] A business violates CalOPPA only if it fails to comply with the law 30 days after being notified of noncompliance.[9] This built-in ability to fix violations after receiving notice of them allows businesses to act quickly to abide by the law. It serves to increase overall business compliance with CalOPPA, accelerating widespread adoption of the law's required privacy policy terms. Without the cure period, the CCPA becomes less focused on reforming businesses practices so they are privacy-enhancing and, as a result, businesses will be more focused on protecting themselves from punitive penalties, a stance that could disproportionately impact small businesses and dissuade them from engaging in the market. As a result, it is our belief the CCPA's existing cure period should remain in the law.

III. Eliminating the Ability to Receive Compliance Advice from the California Attorney General Detracts from Consumer Privacy

Senate Bill 561 would alter the CCPA by striking the right it provides businesses to seek the California Attorney General's opinion on how to comply with the law.[10] Although this may appear to be a minor change that will alleviate some of the burden on the California Attorney General's office, the significance of this change cannot be understated. The CCPA is the first privacy law of its kind in the United States. Its requirements are different from other privacy laws businesses have been working to comply with, such as Europe's General Data Protection Regulation. The CCPA is highly complex, and its terms will evolve going forward. Once the CCPA goes into effect, businesses will have to produce information regularly and accurately on

[7] Cal. Civ. Code § 1798.155(b).

[8] Cal. Bus. & Prof. Code §§ 22575 - 22579. See also the Consumer Legal Remedies Act, which also has a notice and cure provision in Cal. Civ. Code § 1782.

[9] *Id.* at § 22575(a).

[10] Cal. Civ. Code § 1798.155(a).

a massive scale, delete substantial amounts of information, and exclude it from sale, as well as meet numerous other requirements. The far-reaching nature and implications of the new rights created by the CCPA makes it important for businesses to have the ability to reach out to regulators and enforcers to get clarity on the law and their responsibilities.

Removing the right to ask the California Attorney General's opinion on specific CCPA matters will not further consumer privacy. Instead, it will detract from consumer privacy because it will allow businesses' conflicting interpretations of the law to persist unresolved. Furthermore, the bill would make it harder for consumers to understand their rights, because different interpretations of the CCPA by different businesses will cause consumer confusion. The right to solicit the California Attorney General's advice on how to comply with the law should not be removed from the CCPA.

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We ask you to reconsider the modifications to the CCPA in Senate Bill 561. Expanding the private right of action would encourage frivolous lawsuits and misalign the CCPA with other California laws. Eliminating the cure period would remove a powerful way to incentivize businesses to quickly adjust their practices to meet the CCPA's requirements. And eliminating businesses' ability to seek the California Attorney General's advice on ways to comply with the CCPA will cripple important, privacy-advancing conversations regulators and regulated entities could have about the law, which is the first of its kind. It is our belief that the changes posed by Senate Bill 561 could reduce privacy for consumers, rather than expand it, as the law intended. We stand ready to work with you to find solutions to these issues, and we urge you to reconsider Senate Bill 561.

Sincerely,

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