April 4, 2023

TO: Members, Assembly Privacy and Consumer Protection Committee

SUBJECT: AB 1546 (GABRIEL) CALIFORNIA CONSUMER PRIVACY ACT OF 2018: STATUTE OF LIMITATIONS
OPPOSE – AS INTRODUCED FEBRUARY 17, 2023
SCHEDULED FOR HEARING – APRIL 11, 2023

The undersigned organizations must respectfully **OPPOSE AB 1546 (Gabriel)**, as introduced February 17, 2023, which would significantly extend the statute of limitations that applies to civil enforcement actions brought by the Attorney General (AG) against businesses that violate the California Consumer Privacy Act (CCPA). Statutes of limitations play a critical role in our legal system by barring actions after a date certain. Currently, the CCPA requires the California Privacy Protection Agency to commence any administrative enforcement action no more than five years after the alleged violation occurred. This bill seeks to provide parity by also authorizing the AG to bring an action to enforce the CCPA within five years after the cause of action accrued. Simply put, parity is not a sufficient reason to drastically extend the applicable limitations period for the AG to commence civil CCPA enforcement actions. We are unaware of any examples of time-barred claims that the AG has been unable to pursue under existing law; to the contrary, we believe the AG has been able to vigorously enforce the CCPA. It is especially concerning to extend the limitation period here, when businesses have not been afforded the necessary tools (i.e., implementing regulations) and opportunity to successfully come into full compliance with this complex, and often vague, law. We urge you to reconsider the timing of, and need for, this proposal and strongly believe that there is potential to achieve greater consumer benefits by dedicating limited resources toward overseeing the prompt adoption of regulations and giving businesses adequate time to come into full compliance before pursuing actions against them.

AB 1546 is premature and unnecessary: robust enforcement already exists and all parties would be better served by prioritizing efforts that promote compliance.

Our members care deeply about data privacy and compliance with California's data privacy law. The vast majority of businesses have spent thousands of hours and in some cases tens of millions of dollars to come into compliance with the CCPA (AB 375, Chau, Chapter 55, Statutes of 2018) and the amendments made to that law by the California Privacy Rights Act (CPRA; approved by voters in Proposition 24 of 2020). The law is complex and often vague to begin with, and compliance has only been made exponentially more difficult due the Agency's significant delay in issuing comprehensive, final regulations.[1]

That delay has significantly cut down the one-year window that businesses would have had to come into full compliance before Proposition 24 enforcement actions could commence. Now, businesses are in an untenable position of having to defend themselves for possible violations of provisions that they did not

[1] The Agency commenced formal rulemaking on some, but not all, of the identified rulemaking topics on July 8, 2022, clearly missing their voter approved July 1, 2022, deadline for issuing final regulations. There are a host of other issues on which regulations are still due, and for which formal rulemaking has yet to even commence.

have adequate time to implement, or for which there are no regulations in place at all. Yet, instead of addressing issues that continue to undermine the ability of businesses to achieve compliance, this bill prioritizes giving the AG additional time to bring claims for potential violations.

Fundamentally, we question the need for this bill as we are unaware of any examples of time-barred claims that the AG would have otherwise pursued in the five years since the CCPA was first passed and that might indicate a serious problem warranting legislation. To the contrary, we have every reason to believe that there is vigorous, real-time enforcement happening. There are no less than 40 examples of "CCPA Enforcement Case Examples" cited on the AG's website at this time. (*See* CCPA Enforcement Case Examples | State of California - Department of Justice - Office of the Attorney General.)

Extending the statute of limitations for civil enforcement would only amplify the risk that businesses face for alleged violations, through no fault of their own. In contrast, preserving the status quo does not harm consumers because violations can still feasibly be pursued by the Privacy Agency for up to five years. In the rare event that the AG's clock runs out to commence an enforcement action, this "fallback" ensures that consumer rights are still protected and undercuts any need to extend the AG's limitations period.

Finally, there are two other considerations that are important to weigh in conjunction with this proposal. First, Proposition 24 eliminated the CCPA provision that expressly authorized businesses to seek guidance on compliance from the AG. Second, it also repealed provisions pertaining to a right to cure - their ability to avoid penalties by addressing violations within 30 days of notice. Such changes only exacerbate the unfairness of a proposal to now extend the timeframe for the AG to commence an action for CCPA violations.

We would argue that justice is better served by directing any available funding at staffing up the Agency and otherwise providing sorely needed compliance guidance to businesses. Indeed, as outlined further below, we believe all parties benefit from shorter limitations periods as they promote notice of good faith errors and prevent avoidable violations impacting additional consumers earlier.

Statutes of limitations are critical to justice, due process, and timely notice of compliance issues.

Statutes of limitations play a critical role in our legal system by barring actions after a date certain. While they may initially seem unfair or arbitrary, limitations periods exist out of a sense of fundamental fairness and are tailored to the legal interests at stake. Shorter limitations periods serve critical public policy goals that preserve both the integrity and efficiency of our legal system, as well as the due process rights of individuals. Their purpose is to prevent the assertion of stale claims by promoting timely actions, recognizing that paperwork gets lost, witnesses may move or pass away, or their memories may fade by the time an action is commenced. By encouraging the aggrieved party to bring an action earlier, limitations periods also promote finality and further help prevent future harms to others. As the Legislature has recognized time and again when reviewing legislation seeking to extend one limitation period or another, "[t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them." (3 Witkin Cal. Proc. Actions Sec. 433, 4th edition.)

This bill seeks to provide the AG with up to *five times* as many years to bring a CCPA enforcement action than it has under existing law. Certainly, enforcement actions can serve as a deterrent for future violations, but they also serve to place a violating business on notice that they are not compliant, including in cases involving good faith errors as opposed to intentional violations. The shorter limitations period under existing law further ensures that penalties for violations will not continue to accrue until year five, if the claim could have been brought in year one when the violation was first discovered or discoverable. All of these benefits would be undermined based on a stated desire for parity, needlessly overburdening our overworked courts.

Lack of parity cannot be definitively attributed to oversight when the law is silent and is justified given the differences of experience and resources available to the AG and the Agency.

Fundamentally, we disagree that the lack of parity between the statute of limitations for administrative actions by the CPPA and civil enforcement by the AG was an oversight. Silence could easily be interpreted in multiple ways. For example, we would contend that existing law's failure to provide the AG five years to

commence an action after a violation occurs was intentional. Providing a brand-new agency with extended statute of limitations was a practical necessity, as it had zero enforcement capabilities at the time Proposition 24 was passed, and still has very little enforcement capabilities three years later as it continues to staff up. That is not the case for the AG and should be considered in weighing the appropriateness of providing parity here for two governmental bodies with vastly different resources. Moreover, parity is less compelling when you consider the years of experience and resources that the AG's Privacy Unit has in comparison to a brand-new agency.

AB 1546's desire to provide parity in disparate situations is both unnecessary and unfair: these governmental bodies are not similarly situated and there are important differences between administrative and civil enforcement actions that should be considered.

Finally, the differences between and impacts of administrative enforcement as opposed to civil enforcement, as well as the differences between the two governmental bodies between which parity is sought, should not be overlooked. On the former point, consider for example, the impact of longer limitations periods to the courts and our already overburdened legal system is, for obvious reasons, of greater concern with civil enforcement. A five-year statute of limitations only further incentivizes businesses to retain all consumer information for five years, contravening pro-privacy and data minimization principles, and exposes both businesses and consumers alike to high risks associated with data breaches. This, in turn, means greater liability exposure under the CCPA's data breach private right of action. On the latter point, parity is less compelling when you consider the years of experience and resources that the AG's privacy unit has in comparison to a brand-new agency.

In sum, because we are concerned that this change is (1) unwarranted and unfair, (2) contravenes established legal principles around the function of shorter limitations periods, (3) not in the interest of justice and due process rights of businesses (4) incentivizes the AG to wait until violations have accrued significantly before bringing a claim, and (5) exacerbates the compliance challenges that businesses face in an already unstable privacy law landscape, as they continue to await necessary regulations without the ability to at least seek guidance from the AG in the interim, we respectfully must **OPPOSE AB 1546 (Gabriel).**

Sincerely,

Ronak Daylami
Policy Advocate
on behalf of

American Financial Services Association
California Chamber of Commerce
California Credit Union League
California Grocers Association
California Financial Services Association
California Retailers Association
California League of Food Producers
California Manufacturers & Technology Association
Card Coalition
Civil Justice Association of California
Computer & Communications Industry Association (CCIA)
Insights Association
National Payroll Reporting Consortium
NetChoice
Software & Information Industry Association
State Privacy & Security Coalition, Inc.
TechNet

cc: Legislative Affairs, Office of the Governor
Consultant, Assembly Privacy and Consumer Protection Committee
Liz Enea, Consultant, Assembly Republican Caucus

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