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VIA EMAIL

PrivacyRegulations@doj.ca.gov

The Honorable Xavier Becerra
c/o Privacy Regulations Coordinator
California Office of the Attorney General
300 South Spring Street, First Floor
Los Angeles, CA 90013

Re: Comments on Proposed CCPA Regulations

Dear Mr. Becerra:

I write on behalf of myself and Hinshaw & Culbertson LLP to offer comments on the proposed regulations for the California Consumer Privacy Act. This letter follows the oral comments I made at the December 4, 2019 Public Hearing in San Francisco.

Proposed Regulation §999.314(c) May Unintentionally Frustrate the Tripartite Relationship between an Insurer, its Insured, and the Law Firm Retained to Represent the Insured and Interfere with §1798.145(a)(4) of the CCPA

As currently drafted, the proposed regulation §999.314(c) relating to “Service Providers” may frustrate the tripartite relationship between an insurer, its insured and the law firm retained by an insurer to represent its insured. Law firms that do not qualify as a covered “Business” under §1798.140(c) of the CCPA may still be subject to the Act and the proposed regulations if the law firm meets the definition of a “Service Provider” and processes information on behalf of a business.

A Service Provider is defined in §1798.140(v) as:

[A] sole proprietorship, partnership, limited liability company, corporation, association or other legal entity that is

organized for the profit or financial benefit of its shareholders or other owners, that processes information on behalf of a business and to which the business discloses a consumer's personal information pursuant to a written contract, provided that the contract prohibits the entity receiving the information from retaining, using or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business or as otherwise permitted by this title . . .

Because law firms are typically organized to make a profit, they may qualify as a service provider to the extent that the law firm provides legal services to businesses that are subject to the CCPA. Insurance carriers doing business in California that have more than \$25 million in annual gross revenues meet the CCPA's definition of a business. When an insurance carrier that meets the definition of a business retains a law firm, if the written agreement between the law firm and insurance carrier, or the carrier's outside counsel guidelines prohibit the law firm from retaining, using, or disclosing the personal information for any purpose other than the services the law firm was retained to provide, then the law firm meets the definition of a Service Provider, and §999.314(c) is implicated. Today, insurance carriers trying to meet their own data security and privacy obligations routinely limit in writing how law firms may use the information provided by the carrier to the law firm.

Under proposed regulation §999.314(c), a service provider "shall not use personal information received either from a person or entity it services or from a consumer's direct interaction with the service provider for the purpose of providing services to another person or entity." This regulation frustrates the nature and purpose of the tripartite relationship between the law firm, its client – the insured, and the client's insurance carrier. For example, if the law firm (a service provider) is retained by an insurance carrier (a business) to defend its insured, any personal information that the carrier obtained during the claims review process or prior to suit being filed could not be used by the law firm in providing services to its client, the insured. This sharing quagmire extends further and would seemingly prohibit the law firm from sharing information provided by the carrier with experts and consultants necessary to defend the insured.

The Exercise or Defend Claims and Privilege Exceptions in §1798.145(a)(4) and §1798.145(b) Do Not Appear to Apply to Service Providers

While §1798.145(a)(4) and §1798.145(b) of the CCPA provide exceptions to the CCPA's obligations when exercising or defending legal claims and when compliance would violate an evidentiary privilege under California law, those exceptions by their express terms *only* apply to a "Business." There is nothing in the CCPA or your proposed

implementing regulations that extends subsection (a)(4), (b), or any of §1798.145's other subsections to law firms when acting as a service provider on behalf of a business.

While the obvious intent of §1798.145(a)(4) and (b) is to prevent the obligations imposed by the CCPA from impeding litigation and protecting attorney-client and other evidentiary privileges, unless these provisions are interpreted to extend to a law firm service provider retained by a business to defend legal claims such as in the typical tripartite relationship, the intent of this exception will be frustrated. Moreover, proposed regulation §999.314(c) further frustrates the intent of §1798.145(a) and (b). The proposed regulation would impair the ability of a business to defend legal claims through law firm service providers. We ask that the Attorney General consider addressing these issues in a regulation.

The Regulations Should Define "Processing" by Further Explaining the Meaning of "Operation"

We also ask that proposed regulations offer additional clarity to terms defined in the CCPA. For instance, Civil Code §1798.140(q) defines the term "Processing" as "any operation or set of operations that are performed on personal data or on sets of personal data, whether or not by automated means." The terms "operation" and "set of operations" are not defined within the CCPA or the proposed regulations.

It appears the CCPA's definition of "Processing" is drawn from Article 4(2) of the General Data Privacy Regulation ("GDPR"), but it does not include examples of the types of operations encompassed by the CCPA's processing definition as in Article 4(2) of the GDPR. Do those terms, for instance, include merely the storage of information or the use of information in litigation?

Because of the promise of enhanced security offered by cloud providers, many law firms are using a cloud provider to store their data. Does storing personal information in the cloud by a law firm constitute processing that data? Law firms also often use software to collect, manage and search electronically stored information for discovery purposes. It is unclear under the current scheme whether such efforts would constitute "Processing." We request you provide clarification on these points.

The Regulations Should Provide Guidance on §1798.145(a) of the CCPA

Finally, we also write to express our concern about the absence of any regulation clarifying the meaning and intent of Civil Code §1798.145(a), which provides that the obligations imposed on a business by the CCPA shall not "restrict" a business's ability to, among other things, comply with federal, state or local laws, comply with subpoenas or regulatory inquiries or investigations or to exercise or defend legal claims. Does the use of the phrase "shall not restrict" mean that a business does not have to comply with

December 6, 2019

Page 4

§1798.105 when it is reasonably anticipated that information a consumer requests be deleted, may be necessary to exercise or defend legal claims, or to comply with state or federal law? Or does this mean that a business must still comply with some parts of the CCPA that are not affected by its efforts to exercise or defend legal claims? This is especially concerning because subsection (b) expressly uses the phrase “shall not apply” when addressing privileged information:

The obligations imposed on businesses by Sections 1798.110 to 1798.135, inclusive, *shall not apply* where compliance by the business with the title would violate an evidentiary privilege under California law and shall not prevent a business from providing the personal information of a consumer to a person covered by an evidentiary privilege under California law as part of a privileged communication.

Cal. Civil Code §1798.145(b) (emphasis added). The scope of the “exercise or defend legal claims” exception is simply unknown. It is also unclear how transactional legal services may fall into the scope of the CCPA.

We appreciate your efforts to bring clarity and logic to the CCPA through well-reasoned regulations. We recognize the considerable time pressures under which you and your staff have been working. We ask that you consider our comments as you revise the proposed regulations. Thank you for your time and consideration.

Very truly yours,

HINSHAW & CULBERTSON LLP


Joanna L. Storey