THE LAW OFFICE OF
MICHAEL R. GEROE, P.C.
8049 PASEO ARRAYAN
CARLSBAD, CA 92009

TEL. (760) 652-5548

August 11, 2022

VIA ELECTRONIC MAIL
(regulations@cppa.ca.gov)

California Privacy Protection Agency
Attn: Brian Soublet
2101 Arena Blvd., Sacramento, CA 95834

Re: CPPA Public Comment

Dear Mr. Soublet:

I am legal counsel to members of the community regulated by California privacy laws, including the California Consumer Privacy Act of 2018 (CCPA). My clients include privately held and publicly traded domestic and international businesses, generally located throughout North America and Europe. They range from businesses in banking and finance, media content and entertainment, health and beauty industries including prescription and over-the-counter drugs, nutraceuticals and cosmetics, to Internet-based service providers, including experts in marketing and advertising services. I have been advising clients on general compliance matters since 1993, and specifically on data compliance matters since 2004. Among other organizations, I am a member of the International Association of Privacy Professionals and have been certified by them since 2014 as an expert on U.S. privacy law (CIPP/US).

While the U.S. has not yet passed comprehensive federal consumer data privacy legislation, the CAN-SPAM Act of 2003 (CAN-SPAM) serves as long-standing precedent in setting standards for consumer data privacy protection in the field of general advertising. One of the standards set under CAN-SPAM was an avoidance of "magic words" required to be used by the regulated community. While the statute prohibits false or misleading email header information and requires a sender to identify commercial email as an advertisement, it does not mandate a particular method or manner to follow. It is inappropriate and counter-productive for a statute to provide for such detail, and arrogant for a legislature to presume its one method, or limited methods, will prove relevant or sufficient for all manner of use conceived of by the regulated community over time.

California should have followed an analogous approach in drafting the CCPA and subsequent legislation. The California Privacy Protection Agency (the "Agency") should apply such standards in interpreting and enforcing the CCPA and subsequent legislation. The CCPA's provision requiring a regulated business to have a webpage "titled 'Do Not Sell My Personal

Information'" is misguided legislative drafting. See Cal Civ Code § 1798.135(a)(1)(2018). It leads to confusion by both the regulated community and the consumers intended to be assisted by the statute. The disclosure by a business responsible for its webpage may not be limited to the mandated subject heading or may not fit well under the mandated banner. Instead of making a privacy notice easier to understand, it may foster the proliferation of notices, translating into confusing noise for the average consumer. The California Privacy Rights Act has further amended this titling mandate to "Do Not Sell or Share My Personal Information." Id. at § 1798.135(a)(1)(2020) (emphasis added). Such detailed and obscure provisions, coupled with the statute's private right of action, encourage opportunists to assert technical statutory violations for profit. Precedent suggests these actions will consume scarce resources and time of overburdened businesses, as well as courts and the Agency, while doing relatively little to advance a legislative intent focused on interests of consumers and the California economy.

Enforcement of "magic words" will tend to sow dissatisfaction among all stakeholders. Judges and regulators will tend to be distracted by a flood of actions brought for technical violations; consumers will not find greater clarity in privacy notices, which will tend to grow in number, complexity and confusion. Businesses will tend to view regulators as bureaucrats fostering an unwelcome business environment, characterized by changing rules containing increasingly detailed minutiae which appear arbitrary and capricious. Use of magic words amounts to a tax, imposing payment of either the bounties charged by a pool of small but well organized opportunists, or fees for more compliance counsel, or both, to carry on business. The lengths to which members of a cottage anti-spam industry went, tying up state and federal district and appeals courts, pursuing technical violations of privacy laws against law-abiding members of the regulated community, is a matter of public record. See, e.g., Gordon v. Virtumundo, 575 F.3d 1040 (9th Cir. 2009) (plaintiff creating a business to attract commercial email and sue email senders is not the type of party with standing to sue under CAN-SPAM and was not adversely affected in the manner required by the statute).

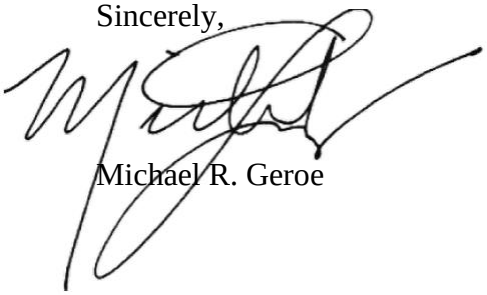
Requiring a separate and distinct hyperlink to the CCPA-mandated privacy policy, e.g., Cal Civ Code, id. at § 1798.135(a)(2) (2018) will have similar results. Some members of the regulated community already use multiple privacy notice hyperlinks – links for non-California residents, links for California residents, cookie policy links, etc., on their websites. The proliferation of hyperlinks encouraged by the CCPA does not serve interests of simplification or clarification of consumer rights, nor the conservation of judicial or Agency resources. The U.S. Court of Appeals for the Ninth Circuit discouraged support for a "cottage industry" seeking to profit from litigation or the threat thereof by exploiting a statutory private right of action. See, e.g., Gordon v. Virtumundo, id. at 1057. Requiring businesses to label privacy hyperlinks with magic words -- "Do Not Sell My Personal Information" one year and "Do Not Sell or Share My Personal Information" another year -- on pain of statutory violation, is a poster-child for misguided legislation. Dictating specific links within a privacy policy is also problematic. Such provisions encourage litigation over non-substantive, technical violations by the regulated

community. Common sense and long-standing U.S. practice support the reservation of statutory magic words for specific and sensitive contexts, such as the use of controlled substances, not general consumer advertising.

For a reasonably drafted privacy policy meeting the substantive requirements of the CCPA or subsequent legislation, failure of a business to use a heading stating "Do Not Sell or Share My Personal Information" should not be grounds for enforcement action by the Agency. Where a link to the privacy policy of a business engaged in general, non-sensitive advertising is clear and conspicuous, the Agency should not take enforcement action where the link created by the business merely failed to use (the most recently amended) magic words.

The Agency's mission and focus, as reflected in its statutory mandate, should be interpretation and enforcement of California's privacy statutes for the protection of California residents and the California economy. Although one can understand why the legislature desires to enforce magic words in an effort to protect the public and the California economy, it is surprising to find such provisions survived the legislative process, in light of decades of relevant experience available on the public record. I hope these comments are helpful in the Agency's consideration of how to calibrate burdens imposed on the regulated community and the intended benefits to all residents of this globally-connected and diverse State.

Sincerely,



Michael R. Geroe