March 8, 2019

California Department of Justice
ATTN: Privacy Regulations Coordinator
300 S. Spring Street
Los Angeles, CA 90013
PrivacyRegulations@doj.ca.gov

RE: **Preliminary Rulemaking Activities related to The California Consumer Privacy Act**

Ladies and Gentlemen:

The Association of Claims Professionals (ACP) is pleased to respond to the request for comment on the Preliminary Rulemaking Activities related to The California Consumer Privacy Act (CCPA). While ACP members are strong proponents of individual privacy rights, we have significant concerns that the unintended application of the CCPA to claims professionals will cause widespread confusion and discord among California consumers and result in conflicting regulatory standards for our members. As such, for the reasons below, we ask the California Department of Justice to clarify the intent of the legislature that the CCPA does not apply to the activities of independent claims professionals.

ACP's Interest in Preliminary Rule Making Activities

ACP (formerly known as the American Association of Independent Claims Professionals or AAICP) was formed in 2002 as the only national association representing the interests of the nation's independent claims professionals. ACP members employ thousands of claims specialists and other professionals across the country and handle millions of property and casualty, workers' compensation, disability, and other liability claims annually. Membership is comprised of independent claims adjusters and third-party administrator organizations, many of whom handle claims administration responsibilities for California insureds and their carriers. ACP member companies employ thousands of adjusters in the State of California and manage billions of dollars of claims for California insurers and policyholders.

Comments on the CCPA

I. The Department Should Clarify that the Claims Adjusting Industry is Exempt from the CCPA.

1. The California Insurance Code, Labor Code, and health laws extensively regulate the claims adjusting industry in the area of transparency and privacy and already provide greater protection specific to insured consumers.

The CCPA was intended to fill in gaps in California privacy law, which is why the California legislature believes existing law should be construed to harmonize with the CCPA *if possible* but preempts the CCPA in the event of a conflict.[1] Moreover, California has specifically and comprehensively addressed transparency and privacy in the claims adjusting industry in a manner that provides greater protection to the consumer than what will be afforded under the CCPA when it is implemented. Given this extensive existing regulation, the Department should clarify that the CCPA does not apply to the claims adjusting industry to avoid conflicting regulation, an uncertain preemption analysis, and to protect consumers.

Perhaps most notably, the California Insurance Information and Privacy Protection Act (IIPPA) regulates the claims management industry as "Insurance Support Organizations" in the context of certain insurance transactions for substantially the same purpose as the CCPA.[2] Indeed, not only are the purposes of the IIPPA substantially similar to the CCPA, but the protections contained within the IIPPA mirrors if not exceed much of the CCPA. For example, insurance institutions or agents must provide a "notice of information practices" upon delivery of a policy or collection of personal information that includes all of the information the CCPA would require *plus* the investigative techniques used to collect such information. Not only that, but California insureds already have rights pursuant to the IIPPA to access, amend, correct, and delete certain information in a manner that actually makes sense in the insurance context.[3]

Other aspects of the California Insurance Code, Labor Code, and health laws have also required transparency and privacy protection for years. Administrators must provide written notice explaining its relationship with the insurer and policyholder "agents of insurers" and face criminal penalties for unauthorized disclosure of confidential information. The Labor Code severely limits what medical information may be disclosed when processing worker's compensation claims.[4] Relatedly, where the CCPA allows requests for the disclosure of relationships with third parties related to a consumer's personal information, the Insurance Code already requires administrators to provide written notice advising insured individuals of the identity of details regarding the relationship between the administrator, policyholder,

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[1] *See* Cal. Civ. Code §1798.175.

[2] *See* Cal. Ins. Code § 791 ("[T]o establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents or insurance-support organizations; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance information practices, including the need to minimize intrusiveness; to establish a regulatory mechanism to enable natural persons to ascertain what information is being or has been collected about them in connection with insurance transactions and to have access to such information for the purpose of verifying or disputing its accuracy; to limit the disclosure of information collected in connection with insurance transactions; and to enable insurance applicants and policyholders to obtain the reasons for any adverse underwriting decision."); Cal. Ins. Code § 791.02 (defining "insurance support organization).

[3] *See* Cal. Ins. Code § 791.08. Similar to the CCPA, access requests must be honored within 30 days, although unlike section 1798.100(d), the IIPPA allows a reasonable fee for the expenses incurred, which is not a difference in the level of privacy protection but rather a reasonable business practice. *See* Cal. Ins. Code §791.10.

[4] *See* Cal. Ins. Code §§ 1759.9, 1877.4; Cal. Lab. Code § 3762.

and insurer.[5] In the context of workers compensation insurance, "agents of insurers" are obligated to keep information confidential and face criminal penalties for unauthorized disclosure of such information.[6]

As referenced above, in addition to the Insurance Code the California Labor Code also limits disclosure of medical information insurers and third party administrators retained by self-insured employers to administer workers' compensation claims receive to: (1) medical information limited to the diagnosis of the mental or physical condition for which workers' compensation is claimed and the treatment provided for this condition; and (2) medical information regarding the injury for which workers' compensation is claimed that is necessary for the employer to have in order for the employer to modify the employee's work duties.[7] Again, these protections are greater than those which will be afforded by the CCPA, arguing in favor of a blanket exemption from the CCPA for independent claims adjusters.

Beyond both the Insurance and Labor Codes, a third law -- the Confidential Medical Information Act (CMIA) -- also restricts the use and disclosure of any medical information claims professionals receive. For example, "[n]o person or entity engaged in the business of furnishing administrative services to programs that provide payment for health care services shall knowingly use, disclose, or permit its employees or agents to use or disclose medical information possessed in connection with performing administrative functions for a program, except as reasonably necessary in connection with the administration or maintenance of the program, or as required by law, or with an authorization."[8] Further, when claims professionals ("that provide[] billing, claims management, medical data processing, or other administrative services for providers of health care or health care service plans or for insurers, employers, hospital service plans, employee benefit plans, governmental authorities, contractors, or other persons or entities responsible for paying for health care services rendered to the patient receive medical information from health care providers and health care service plans") receive medical information from health care providers or health care service plans, they cannot further disclose the information in a way that would violate the CMIA.[9]

California has already enacted a significant body of law to increase transparency for and protect the privacy of insured California consumers. If the CCPA was interpreted to apply to the claims adjusting industry the result would be a complicated patchwork quilt of regulation that lessens, rather than increases, consumer privacy. Further, application of the CCPA to the claims management industry would result in uneven application of the law given that each company would need to apply a complicated preemption analysis to nearly every right in the CCPA and decide if existing law or the CCPA is more stringent in the particular scenario.

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[5] *See* Cal. Ins. Code § 1759.9.
[6] *See* Cal. Ins. Code § 1877.4.
[7] *See* Cal. Lab. Code § 3762.
[8] Cal. Civ. Code § 56.26(a).
[9] *See* Cal. Civ. Code § 56.10(c)(3).

2. **Where the CCPA may be said to apply, the law already contains explicit exceptions for key aspects of the claims adjusting industry, creating confusion for consumers.**

The application of the CCPA to the claims adjusting industry will result in widespread consumer confusion without providing additional privacy or transparency protections. Where the law could arguably be read to apply, the CCPA exempts nearly all of the personal information the claims management industry receives in order to process claims: medical information governed by the CMIA, protected health information (PHI) collected as a business associate under HIPAA, information collected as part of a clinical trial, information in consumer credit reports, and in some cases, financial information disclosed pursuant to federal and California law. It is unclear and debatable whether any remaining information that does not fit neatly into the above exempt categories would be subject to CCPA obligations.

Further, claims management activities will constantly trigger CCPA exceptions, particularly when it comes to deletion requests directly from consumers or indirectly from businesses subject to the CCPA. The application of exceptions, which are needed to comply with existing law, will create confusion and likely frustration for consumers trying to exercise CCPA rights.[10] For example, administrators will be exempt from deleting information related to transactions they are required to maintain confidentially in books and records and make available to insurers for at least five years pursuant to existing legal obligations.[11] In other words, insureds that lodge deletion requests in accordance with the CCPA rather than the proper procedure for the insurance context provided by the IIPPA will fall within an exception and therefore be rendered meaningless. This is why in addition to drafting the legal obligation exception to deletion requests, the CCPA repeats that the law is not intended to restrict the ability to comply with other laws.

As noted above, wherever the CCPA may be stretched to cover any remaining claims management activities that are not already facially exempt based on the category of information, the law will nevertheless constantly provide exception. Not only does this create a genuine question for members of the claims adjusting industry as to whether the CCPA is relevant to them, but it will undoubtedly create confusion and likely frustration for consumers and CCPA-regulated businesses that may not understand why the industry is exempt from complying with so many of their requests. To avoid both outcomes, the Department should issue a clear statement exempting the independent claims adjusting industry from the scope of the CCPA.

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[10] The most common exceptions will include (1) to complete the transaction for which the personal information was collected, provide a good or service requested by the consumer, or reasonably anticipated within the context of a business's ongoing business relationship with the consumer, or otherwise perform a contract between the business and the consumer; (2) to enable solely internal uses that are reasonably aligned with the expectations of the consumer based on the consumer's relationship with the business; (3) to comply with a legal obligation; or (4) to otherwise use the consumer's personal information, internally, in a lawful manner that is compatible with the context in which the consumer provided the information. *See* Cal. Civ. Code §1798.105(d).

[11] *See* Cal. Ins. Code § 1759.3.

3. **The California legislature did not intend the CCPA to further regulate the pro-consumer claims adjusting industry; the Department should make that explicitly clear.**

The preamble to the CCPA emphasizes the intent of the California legislature to create privacy protections in response to business practices proliferated by the age of big data, while acknowledging existing law has already provided such protection in various other contexts. California had the same concerns regarding transparency and privacy protection in the claims management and broader insurance industry and intentionally addressed these concerns effectively throughout the state's legal code. Claims adjusters are specifically covered by existing law. The adjusting industry works on behalf of individuals and businesses in times of need, such as the recent California wildfires, delivering an estimated $45 billion each year in claims payments. It would be deeply unfortunate if the CCPA were to unintentionally sweep up claims adjusters and double-regulate the industry, likely lessening today's existing protections. These unnecessary gray areas would disrupt functioning privacy compliance programs in the claims industry and even worse, burden claims recovery efforts from proceeding as quickly and smoothly as possible. It is clear that the California legislature intended the CCPA to exempt claims adjusters -- the Department's regulations should remove any ambiguity and clearly reflect that intent.

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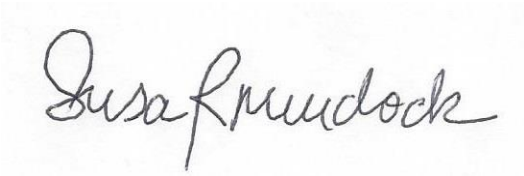
ACP appreciates the opportunity to provide comments on the Preliminary Rulemaking Activities related to the CCPA. If you have any questions concerning our comments, or if we can be of further assistance, please contact Susan Murdock at susan@murdockinc.com. We thank you for consideration of these comments and welcome any further questions you may have.

Sincerely,



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