NEW JERSEY CIVIL JUSTICE INSTITUTE

MEMORANDUM

TO: Assembly Science, Innovation and Technology Committee
FROM: Anthony M. Anastasio, President
SUBJECT: A3255, A3283, A5448
DATE: March 12, 2021

The New Jersey Civil Justice Institute ("NJCJI") is a statewide, nonpartisan coalition of the state's largest employers, small businesses, and leading trade associations. NJCJI's mission is to promote a fair and predictable civil justice system in New Jersey, which is an essential ingredient of economic stability and innovation. This correspondence serves to identify NJCJI's concerns regarding Assembly Bill Nos. 3255 and 3283, as contrasted with A5448, and offer general insights regarding state privacy legislation.

Exclusive Government Enforcement

NJCJI's primary concern here is that Section 14 of A3255 and Section 24 of A3283 make violations of any of the bills' requirements an unlawful practice under the New Jersey Consumer Fraud Act ("NJCFA"), which generally provides a private right of action for violations. *See N.J.S.A.* 56:8-19. The NJCFA allows private claimants, who successfully prove that an unlawful practice and related ascertainable loss occurred, to recover treble (triple) damages and attorneys' fees. *Id.*; *see also Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454 (1994). The problem with this is, these bills deal with complex and technical topics, and thus, set forth highly detailed requirements. Incentivized by the enhanced private remedies of the CFA, plaintiffs' lawyers will pursue aggressive interpretations of these technical requirements to play a game of "gotcha" with businesses that are operating in good faith. Facing exposure to legal defense costs and the risk of triple damages, small and medium-sized businesses will be compelled to settle spurious claims. This hurts businesses' bottom line, which in turn negatively affects innovation and job creation in our state.

NJCJI therefore respectfully submits that state privacy laws should expressly preclude private lawsuits for violations. Instead, New Jersey should explicitly vest its Attorney General with exclusive enforcement authority with respect to these laws. Section 10 of A5448 seeks to do so and is smart public policy in this regard. Experts with technical expertise and sound discretion---not enterprising plaintiffs' lawyers looking for a financial windfall---should lead consistent enforcement efforts here, which will both protect consumers and allow for continued innovation. New Jersey endows its Attorney General with immense power to protect consumers. There should be no doubt that our Attorney General has a public mandate and sufficient resources to pursue bad actors who hurt consumers in the context of data privacy. Spreading out enforcement authority beyond our Attorney

General, to private plaintiffs, their attorneys, municipal governments, or other state agencies, risks inconsistent and unfair application of privacy laws by entities that lack expertise, accountability for statewide priorities, and the ability to coordinate investigations across the country.

Reasonable Cap on Civil Penalties

NJCJI also respectfully submits that state privacy laws should impose reasonable caps on civil penalties for violations. Company-ending civil penalties are not necessary to ensure that businesses comply with the requirements of state privacy laws. Indeed, when mistakes are made that result in data breaches, the reputational damage to businesses is already extremely high, so state laws need not be excessively punitive.

For example, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") incorporates penalty caps. The caps are tiered based on the culpability of the violator (e.g., negligence versus "willful neglect"). *See* 42 *U.S.C.* § 1320d-5(a)(1). For example, the low tier limits the penalty amount to "$100 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $25,000." *Id.* at § 1320d-5(a)(3)(A).

Notice and Opportunity to Cure Good Faith Violations

Finally, NJCJI respectfully submits that state privacy laws should provide regulated parties with notice and an opportunity to cure good faith violations before authorizing government enforcement. Again, privacy laws are complex, and even companies with the best intentions may err in attempting to comply in real-world scenarios. It is in everyone's best interest—the government, businesses, and consumers—to give companies notice and the opportunity to course correct before being subject to enforcement.

HIPAA serves as a notable example of a longstanding privacy statute that vests exclusive enforcement authority in the government and provides regulated entities with an opportunity to cure good faith violations. Under HIPAA, "the Secretary may not impose a civil money penalty on a covered entity or business associate for a violation if the covered entity or business associate establishes to the satisfaction of the Secretary that the violation is (1) [n]ot due to willful neglect; and (2) corrected during either: (i) [t]he 30-day period beginning on the first date the covered entity or business associate liable for the penalty knew, or, by exercising reasonable diligence, would have known that the violation occurred; or (ii) [s]uch additional period as the Secretary determines to be appropriate based on the nature and extent of the failure to comply." 45 *C.F.R.* § 160.410(c).

As the authors of HIPAA surely realized, for a right to cure good faith violations to be truly viable, the government must possess exclusive enforcement authority. Unlike plaintiffs' attorneys pursuing private actions, the government has no personal financial incentive to pursue enforcement. The government can therefore exercise sound discretion and make objective determinations regarding a regulated entity's good faith and the quality of its efforts to remediate violations, thereby providing an effective right to cure. On the other hand, given the powerful financial incentives inherent in lawsuits under the CFA, plaintiffs' attorneys will always claim that a business

demonstrated willful neglect or that its remedial actions were insufficient. This results in costly litigation of those issues in every matter, rendering any right to cure illusory from a practical perspective. Read together, Sections 8 and 10 of A5488 appear to recognize this practical reality by providing a 30-day right to cure along with exclusive government enforcement authority. This is smart public policy.

Conclusion

For these reasons, NJCJI respectfully submits that exclusive government enforcement, including a right to cure good faith violations and effective penalties for bad actors, will strike an effective balance between consumer protection and innovation in New Jersey.