



March 27, 2020

Lisa B. Kim, Privacy Regulations Coordinator
California Office of the Attorney General
300 South Spring Street, First Floor
Los Angeles, CA 90013

RE: Second Set of Proposed Regulations Implementing the California Consumer Privacy Act

Dear Privacy Regulations Coordinator:

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies, from small businesses to household brands, across every segment of the advertising industry. We provide the following comments to the California Office of the Attorney General ("OAG") on the proposed regulation included in 999.315(d) of the March 11, 2020 release of the second set of modifications to the text of the proposed regulations implementing the California Consumer Privacy Act ("CCPA").¹ This requirement exceeds the scope of the OAG's ability to regulate in conformance with the CCPA, runs afoul of free speech rights inherent in the United States Constitution, and impedes the ability of consumers to exercise granular choices in the marketplace. We ask that it be struck or modified per the below comment.

The undersigned organizations' combined membership includes more than 2,500 companies, is responsible for more than 85 percent of U.S. advertising spend, and drives more than 80 percent of our nation's digital advertising spend. Locally, our members are estimated to help generate some \$767.7 billion dollars for the California economy and support more than 2 million jobs in the state.² We and our members strongly support the underlying goals of the CCPA, and we believe consumer privacy deserves meaningful protections in the marketplace. However, as discussed in our previous submissions and in the sections that follow below, the draft regulations implementing the law could be updated to better enable consumers to exercise meaningful choices and to help businesses in their efforts to continue to provide value to California's consumers and its economy.³

Despite businesses' best efforts to develop compliance strategies for the CCPA, current events coupled with the unfinalized nature of the draft rules stand in the way of entities' earnest work to facilitate compliance with the law. As we have discussed in our prior submissions, the draft rules' onerous terms concerning global controls and browser settings stand to impede consumer choices as well as access to various products, services, and content in the digital ecosystem. More urgently, the novel coronavirus known as COVID-19 has shaken businesses' standard operating procedures as well as the development of policies, processes, and systems for the CCPA. In this period of crisis facing the world-at-large, entities should be focused on dedicating funds, time, and efforts to supporting their employees and the response to

¹ See California Department of Justice, *Notice of Second Set of Modifications to Text of Proposed Regulations* (Mar. 11, 2020), located at <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-notice-of-second-mod-031120.pdf?>

² IHS Economics and Country Risk, *Economic Impact of Advertising in the United States* (Mar. 2015), located at <http://www.ana.net/getfile/23045>.

³ Our organizations have submitted joint comments throughout the regulatory process on the content of the OAG's proposed rules implementing the CCPA. See *Joint Advertising Trade Association Comments on California Consumer Privacy Act Regulation*, located at <https://oag.ca.gov/sites/all/files/agweb/pdfs/priavcy/ccpa-public-comments.pdf> at CCPA 00000431 - 00000442; *Revised Proposed Regulations Implementing the California Consumer Privacy Act*, located at <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-15-day-comments-022520.pdf> at CCPA_15DAY_000554 – 000559.

the coronavirus outbreak rather than diverting resources to prepare for an ever-evolving set of regulations under the CCPA. Therefore, we support the request made earlier this month by a group of sixty-six (66) trade associations, organizations, and companies to your office asking you to delay enforcement until January 2, 2021.⁴

Our members are committed to offering consumers robust privacy protections while simultaneously maintaining their ability to support California's employment rate and its economy in these unprecedented times as well as access to ad-funded news. We believe a regulatory scheme that enables strong individual privacy protections alongside continued economic development and advancement will best serve Californians. The suggested updates we offer in this letter would improve the CCPA implementing regulations for Californians as well as the global economy.⁵

I. Give Businesses the Option to Honor Browser Settings and Global Controls

The revised proposed rules require businesses that collect personal information from consumers online to treat user-enabled global controls, such as a browser plugin or setting, device setting, or other mechanism that purports to carry signals of the consumer's choice to opt out of the sale of personal information, as a valid request submitted for that browser, device, or consumer.⁶ This requirement exceeds the scope of the OAG's authority to regulate pursuant to the CCPA, runs afoul of free speech rights inherent in the United States Constitution, and impedes consumers of the ability to exercise granular choices in the marketplace. For these reasons, we ask the OAG to remove this requirement, or, at a minimum, to give businesses the option to honor such controls or decline to honor such settings if the business offers another, equally effective method for consumers to opt out of personal information sale.

a. The Browser Setting and Global Control Mandate Exceeds the OAG's Regulatory Authority Pursuant to the CCPA

Requiring businesses to honor such controls and browser settings is an obligation that has no support in the text of the CCPA itself and extends far beyond the intent of the California Legislature in passing the law. Under California administrative law, when an agency is delegated rulemaking power, rules promulgated pursuant to that power must be "within the lawmaking authority delegated by the Legislature," and must be "reasonably necessary to implement the purposes" of the delegating statute.⁷ The CCPA gives the OAG power to "adopt regulations to further the purposes of [the CCPA]," but not to adopt regulations that contravene the framework set up by the Legislature when it passed the law.⁸

The CCPA was plainly structured to provide consumers with the right to opt out of sales of personal information.⁹ However, the requirement to respect the proposed controls and browser settings effectively transforms the CCPA's opt-out regime into an opt-in regime by enabling intermediaries to set opt-out signals through browsers that apply a single signal across the entire Internet marketplace. Individual businesses will consequently be forced to ask consumers to opt in after receiving a global opt-out signal set by an intermediary, thereby thwarting the granular opt-out structure the California Legislature purposefully enacted in passing the CCPA. The OAG's regulation mandating that businesses

⁴ *Joint Industry Letter Requesting Temporary Forbearance from CCPA Enforcement* (Mar. 20, 2020), located at <https://www.ana.net/getfile/29892>.

⁵ These comments are supplementary to filings that may be submitted separately and individually by the undersigned trade associations.

⁶ Cal Code Regs. tit. 11, § 999.315(d) (proposed Mar. 11, 2020).

⁷ *Western States Petroleum Assn. v. Bd. of Equalization*, 304 P.3d 188, 415 (Cal. 2013) (quoting *Yamaha Corp. of America v. State Bd. Of Equalization*, 960 P.2d 1031 (Cal. 1998)).

⁸ Cal. Civ. Code § 1798.185.

⁹ *Id.* at § 1798.120.

obey such controls and browser signals therefore exceeds the scope of the OAG’s authority to issue regulations under the CCPA.

The requirement to obey such controls is a substantive obligation that the California Legislature did not include in the text of the CCPA itself. Despite numerous amendments the legislature passed to refine the CCPA, none of them included a mandate for browser signals or global controls. Additionally, the California Legislature considered a similar requirement in 2013 when it amended the California Online Privacy Protection Act (“CalOPPA”), but it declined to impose a single, technical-based solution to address consumer choice and instead elected to offer consumers multiple ways to communicate their preferences to businesses.¹⁰ The Legislature did not intend to institute a requirement to mandate global controls or browser signals when it amended CalOPPA in 2013, and it similarly did not intend to do so when it passed the CCPA in 2018. The obligation to honor such signals in the draft rules therefore thwarts legislative intent and is an impermissible exercise of the OAG’s ability to issue regulations under the law.

b. The Browser Setting and Global Control Mandate Contravenes Constitutional Rights to Free Speech

The OAG’s proposed rule regarding such controls and browser signals violates the First Amendment to the United States Constitution by converting the CCPA’s opt-out structure into a de facto opt-in structure and by improperly restricting free speech. Businesses’ dissemination of the data they collect constitutes constitutionally protected commercial speech.¹¹ A regulation restricting commercial speech is unconstitutional unless the state has a substantial interest in restricting this speech, the regulation directly advances that interest, and the regulation is narrowly tailored to serve that interest.¹² While there may be a substantial state interest in protecting consumer privacy,¹³ the OAG’s directive to respect such controls and browser settings does not advance the government’s substantial interest. Moreover, this rule is not narrowly tailored to advance such an interest. The regulatory requirement therefore violates the First Amendment.

Commercial speech is entitled to protections under the United States Constitution. Regulations that provide “ineffective or remote support for the government’s purpose” impermissibly burden constitutional protections afforded to commercial speech.¹⁴ The wide-ranging opt-out structure set forth by the California Legislature and the OAG particularly focus on a consumer’s relationship with an individual business. This structure enables consumers to express opt-out preferences in the context of their unique relationships with individual entities. By contrast, the global controls mandate obligates businesses to figure out consumers’ individual preferences regarding data disclosures from a singular browser setting. Moreover, requiring businesses to defer to such controls as a way to understand consumers’ true preferences is less effective and less direct than the opt-out methods employed by the rest of the OAG’s regulations. If the state’s interest is in stopping the disclosure of specific data that a consumer wishes to restrict from sale, such a proposal does not adequately further this aim. It provides no way for businesses

¹⁰ See *Assembly Committee on Business, Professions and Consumer Protection*, Hearing Report on AB 370 (Cal. 2013) (Apr. 16, 2013), located at https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB370# (“According to the California Attorney General’s Office, ‘AB 370 is a transparency proposal – not a Do Not Track proposal. When a privacy policy discloses whether or not an operator honors a Do Not Track signal from a browser, individuals may make informed decisions about their use of the site or service.’”)

¹¹ See *Individual Reference Services Group, Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001); *Boetler v. Advance Magazine Publishers Inc.*, 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016).

¹² *Individual Reference Services Group, Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001).

¹³ *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187, 1192 (W.D. Wash.).

¹⁴ *Id.* (quoting *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980)).

to divine that a consumer wishes to keep personal information within the confines of a specific business relationship, and instead compels businesses to guess at consumers' preferences from an indirect signal that may not accurately reflect a consumer's wishes.

In addition, the AG's proposed rule is not narrowly tailored to serve the state's interest. Instead, it senselessly restricts the commercial speech of businesses without supporting the efficacy of the existing opt-out framework. Narrowly tailored regulations are not disproportionately burdensome. Additionally, they must "signify a careful calculation of the costs and benefits associated with the burden on speech imposed."¹⁵ The existing opt-out regime implemented by the California Legislature offers businesses more exact information about specific, granular preferences of individual consumers than the global controls mandate. The global controls requirement serves no purpose that is not already served by existing opt-out rules in the draft regulations and the law itself, and it could potentially restrict speech by requiring businesses to act on inaccurate information about a consumer's individual preferences.

The proposed regulations note that businesses may contact consumers to ascertain their true intent regarding personal information sales if a global control conflicts with a choice the consumer individually set with the business. However, the rules require the business to defer to the global controls in the meantime, thus mandating a potentially incorrect expression of user preferences at the expense of specific choices the consumer indicated to the contrary. In addition, businesses bear the burden of ascertaining the consumer's true intent after receiving a global signal that does not align with an individual consumer's preferences. In contrast, the opt-out privacy framework set forth in the CCPA itself and bolstered by the draft rules is both more precise and less burdensome. It enables businesses to assess specific preferences of users in the context of each unique consumer relationship, and it restricts commercial speech only if that speech is known to contravene consumer preferences. The global controls mandate consequently does not further the goals of the existing framework, but it does needlessly restrict commercial speech. The global controls rule therefore does not pass constitutional muster because it burdens commercial speech without appropriately balancing those burdens with benefits.

c. The Browser Setting and Global Control Mandate Impedes Consumer Choice

The revised proposed rules' imposition of a requirement to honor such controls would result in broadcasting a single signal to all businesses, opting a consumer out from the entire online ecosystem. This requirement would obstruct consumers' access to various products, services, and content that they enjoy and expect to receive, and it would thwart their ability to exercise granular, business-by-business selections about entities that can and cannot sell personal information in the digital marketplace.

In the March 11, 2020 updates to the draft rules, the OAG removed the requirement for a consumer to "affirmatively select their choice to opt-out" and the requirement that global controls "shall not be designed with any pre-selected settings."¹⁶ The removal of these provisions entrench intermediaries in the system and will advantage certain business models over others, such as models that enable direct communications between consumers and businesses. It will also enable intermediaries to set *default* signals through browsers without consumers having to approve of them before they are set. This outcome risks causing businesses to take specific actions with respect to consumer data that the consumer may not want or intend. The OAG should take steps to ensure that default privacy signals may not be set by intermediaries without the consumer approving of the signals set and the choices they relay to businesses.

Moreover, the draft rules do not address how businesses should interpret potentially conflicting signals they may receive directly from a consumer and through a global control or a browser setting. For

¹⁵ *Id.* at 1194.

¹⁶ Cal. Code Regs. tit. 11, § 999.315(d)(2) (proposed Mar. 11, 2020).

example, if a business directly receives a consumer’s permission to “sell” personal information, but later receives a global control signal through a browser set by default that indicates the consumer has opted out of such sales, which choice should the business follow? The CCPA itself allows businesses to contact consumers asking them to opt in to personal information sales after receiving opt-out signals only once in every twelve month period.¹⁷ As such, the business’s ability to communicate with the consumer to ascertain their true intentions may be limited despite the draft regulations’ statement that a business may notify consumers of conflicts between setting and give consumers the choice to confirm the business-specific setting.

To preserve consumers’ ability to exercise granular choices in the marketplace, to keep the regulations’ requirements in line with constitutional requirements and legislative intent in passing the CCPA, and to reduce entrenchment of intermediaries and browsers that have the ability to exercise control over settings, we ask the OAG to remove the requirement to obey such controls. Alternatively, we ask the OAG to update the draft rules so a business may *either* honor user-enabled privacy controls or decline to honor such settings *if* the business provides another equally effective method for consumers to opt out of personal information sale, such as a “Do Not Sell My Personal Information” link.

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Thank you for the opportunity to submit input on the content of the revised proposed regulations implementing the CCPA. Please contact Mike Signorelli of Venable LLP at 202-344-8050 with any questions you may have regarding these comments.

Sincerely,

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¹⁷ Cal. Civ. Code § 1798.135(a)(5).