



February 25, 2020

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

RE: Revised 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 content of the February 10, 2020 release of revised proposed regulations implementing the California Consumer Privacy Act ("CCPA").¹ We appreciate the opportunity to continue to engage with the OAG on the important subject of consumer privacy and the implementing regulations that will help shape privacy protections in the state of California.²

We and our members strongly support protecting the privacy of Californians, and we believe consumer privacy deserves meaningful protection. We are encouraged by several updates the OAG made to the CCPA implementing regulations that will enhance consumer privacy and provide more clarity for businesses in their efforts to operationalize the law's terms. However, certain specific issues, which we address below in this letter, could be further clarified to help preserve consumers' ability to exercise meaningful choice in the marketplace and businesses' ability to provide products and services that consumers expect and value. We are also concerned that the quickly impending CCPA enforcement date of July 1, 2020 will leave little to no time for businesses to implement the changes the OAG has made to the draft regulations as well as any additional updates the OAG may make to the regulations before July of this year.

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.³ Our members want to provide consumers with robust privacy protections while simultaneously maintaining their ability to do business in ways that benefit California's employment rate and its economy. We believe a regulatory scheme that enables strong individual privacy protections alongside continued economic development and advancement will best serve California consumers.

¹ See California Department of Justice, *Updated Notice of Modifications to Text of Proposed Regulations and Addition of Documents and Information to Rulemaking File* (Feb. 10, 2020), located at <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-notice-of-mod-020720.pdf?>.

² Our organizations submitted joint comments on the content of the OAG's original 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/privacy/ccpa-public-comments.pdf> at CCPA 00000431 - 00000442.

³ IHS Economics and Country Risk, *Economic Impact of Advertising in the United States* (Mar. 2015), located at <http://www.ana.net/getfile/23045>.

The requests we pose in this submission represent targeted suggestions to improve the CCPA implementing regulations for consumers and businesses alike. These comments are supplementary to filings that may be submitted separately and individually by the undersigned trade associations.

I. Afford Businesses Time to Update Their Practices in Light of Regulatory Revisions

Although the CCPA went into effect on January 1, 2020, the final regulations have not yet been promulgated, leaving our members and thousands of other California businesses uncertain concerning their ultimate compliance obligations. Given the extraordinary complexity of the law and the potential for other open issues to be clarified in subsequent updates to the draft rules, there will not be sufficient time for businesses to effectively implement the final regulations prior to the anticipated enforcement date of July 1, 2020. We therefore ask you to delay enforcement of the CCPA until January 2021 in order to provide businesses a sufficient time period to implement the new regulations before being subject to enforcement.

a. It Is Appropriate to Provide Businesses a Reasonable Period of Time to Implement the Regulatory Updates

As soon as the California Legislature passed the CCPA, it was clear that the law's requirements would evolve through both the legislative and rulemaking process. It was not clear, however, that key CCPA provisions would be substantially amended so close to its effective date, and that the rules implementing its terms would not be finalized until after the law became operative.

While we recognize that the amendments in the California Legislature delayed the development and formal release of draft regulations implementing the CCPA until October 11, 2019,⁴ these draft rules presented significant new and unprecedented requirements, such as entirely new recordkeeping obligations, notice requirements, and verification rules, among many other novel obligations.⁵ Then, on February 10, 2020, the rules changed again, altering the requirements businesses had used to build systems, processes, and policies for the CCPA. Businesses are contending with the proposed regulations' new mandates from both the October 11, 2019 and February 10, 2020 release of draft rules, and they are working earnestly to adjust their systems and build new processes to facilitate compliance.

Unfortunately, it is presently unclear when the rules will be finalized and whether they will be further amended. Just mere months before enforcement is scheduled to begin, companies that are subject to the CCPA are faced with the possibility that the draft rules could substantially change again and impose other entirely new requirements and nuances on businesses. If the rules change again, the OAG must issue a new notice in the California Regulatory Notice Register and provide for another comment period of 15 to 45 days.⁶ The rules will not be effective until they are submitted and reviewed by the Office of Administrative Law, further reducing the time available to businesses to implement the regulations. This timeline increases the likelihood that the draft rules will not be finalized before, or only a short period prior to the law's July 1, 2020 enforcement date.

We and our members strongly support the underlying goals of the CCPA. The limited and quickly shrinking time before the existing enforcement deadline, however, will place businesses in a nearly untenable position. Without final regulatory requirements, businesses will be unable to make operational changes to their systems, further delaying finalization of their compliance programs. Businesses should be

⁴ See State of California Office of Administrative Law, *Notice Publication/Regulations Submission* (Oct. 11, 2019), located at <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-std400a.pdf>.

⁵ Cal. Code Regs. tit. 11, § 999.305-308, 317, 323-325 (proposed Feb. 10, 2020).

⁶ See Office of the Attorney General, California Department of Justice, *California Consumer Privacy Act (CCPA): Background on Rulemaking Process* at 3, located at https://oal.ca.gov/rulemaking_participation.

afforded an appropriate time period to implement the new regulations once they become final and before being subject to enforcement.

b. Providing a Reasonable Period of Time for Implementing the New Regulations Benefits Consumers

While the law instructs the OAG not to bring any enforcement action prior to July 1, 2020, there is no restriction on you providing a reasonable period of additional time for California businesses to review and implement the final regulations before your office initiates any enforcement actions.⁷ Thus, in order to avoid consumer and business confusion with respect to the new rules, we request that you delay enforcement of the law to begin in January 2021. This short deferral will give businesses the time they need to understand and effectively operationalize the rules helping ensure consumers have access to the rights afforded under the new law.

Business attempts to comply with an incomplete legal regime risk causing significant consumer frustration and the implementation of inadequate or duplicative compliance tools. While we understand that your office is working expeditiously to provide clear rules for businesses to operationalize the CCPA, the clock is working against well-intentioned businesses in their compliance efforts. We urge you to give California business the opportunity to understand what is required under the law before they are at risk for being penalized for violating its terms.

While our members support California's intent to provide consumers enhanced privacy protections, the evolving nature of the CCPA and the draft nature of the proposed rules make the current enforcement date of July 1, 2020 a difficult deadline for businesses and consumers alike. Consumer privacy is best served when businesses that leverage data do so in accordance with clear and concrete laws and regulations that present them with adequate time to adjust their practices to come into compliance with new requirements.

We urge you to provide a moratorium on enforcement until January 2021, thereby giving businesses throughout the United States that operate in California adequate time to prepare to adhere to the law's final form. Delaying the CCPA's enforcement in this manner will help ensure that businesses can effectively provide consumers with the new protections and rights that the law and its implementing regulations require.

II. Enable Consumer Choice By Removing the Requirement to Honor Browser Settings and Global Privacy Controls

The revised proposed rules require businesses that collect personal information from consumers online to treat user-enabled global privacy controls, such as a browser plugin or privacy setting, device setting, or other mechanism that signals the consumer's choice to opt out of the sale of personal information, as a valid request submitted for that browser, device, or consumer.⁸ In our prior submission to the OAG, we explained that this requirement robs consumers of the ability to exercise granular choice. This mandate would obstruct consumers' individualized, business-by-business decisions about entities that can and cannot engage in the sale of personal information. Moreover, this requirement represents an obligation that has no support in the text of the CCPA itself and extends far beyond the likely intent of the California Legislature in passing the law. For these reasons, we renew our request for the OAG to remove the requirement to respect user-enabled global privacy controls, or, at a minimum, to give businesses the

⁷ Cal. Civ. Code § 1798.185(c).

⁸ Cal Code Regs. tit. 11, § 999.315(d) (proposed Feb. 10, 2020).

option to honor user-enabled global privacy controls or decline to honor such settings if the business offers another, equally effective method for consumers to opt out of personal information sale.

The requirement to honor user-enabled global privacy 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 to honor browser signals or global privacy controls. Additionally, the California Legislature considered a similar requirement in 2013 when it amended the California Online Privacy Protection Act, 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.⁹ The revised proposed rules' imposition of a requirement to honor user-enabled privacy controls would result in broadcasting a single signal to all businesses opting a consumer out from the entire data marketplace. This requirement would obstruct consumers' access to various products, services, and content that they enjoy and expect to receive.

Additionally, requiring businesses to honor global, single-signal privacy control opt out choices would effectively convert the CCPA's statutorily mandated opt out regime to an opt in regime. Because businesses would be required to respect a user-enabled global privacy control opt out setting under the draft rules, they would be forced to approach consumers on an individualized basis to ask them to opt in to personal information sale after receiving a user-enabled global privacy setting opt out through a browser. This outcome is certainly not the result the California Legislature intended in passing the CCPA, which clearly proposes an opt out approach to consumer data sales rather than an opt in approach.¹⁰

In the most recent iteration of the draft rules, the OAG added provisions to the requirement that allow a business to notify a consumer of a conflict between any business-specific privacy setting or financial incentive and a global privacy control.¹¹ According to the updated regulations, a business may give the consumer a choice to confirm the business-specific setting or the global privacy control.¹² However, the draft rules still require a business to "respect the global privacy control," thereby forcing businesses to act on global privacy settings before they can confirm whether the consumer actually wanted to make a choice to end beneficial transfers of data that occur via the Internet.¹³ This option, therefore, does nothing to further a consumer's actual desired or expressed choices. The fact that the rules now allow for a business to confirm a consumer's intentions does little to save the consumer from unintentionally losing access to various products, services, and valuable content through the Internet. Additionally, this provision stands to advantage certain players in the market that have a direct relationship with consumers. Businesses that do not directly interact with consumers online, such as third-party entities, would not have the ability to confirm whether a consumer intended to apply a browser signal or privacy setting to the entire Internet or whether the consumer would rather abide by the choice the consumer made with respect to that particular business.

The revised proposed rules also note that a privacy control "shall require that the consumer affirmatively select their choice to opt-out and shall not be designed with any pre-selected settings."¹⁴ Although this new provision reduces the potential for default settings to miscommunicate consumers' actual preferences, it does not address the fact that intermediaries in the online ecosystem stand between consumers and businesses and have the ability to interfere with the data-related selections consumers may make through technological choice tools. Obligating businesses to honor user-enabled privacy settings

⁹ See AB 370 (Cal. 2013).

¹⁰ Cal. Civ. Code § 1798.120.

¹¹ Cal. Code Regs. tit. 11, § 999.315(d)(2) (proposed Feb. 10, 2020).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at § 999.315(d)(2).

that are presented to consumers through an intermediary vests power in the hands of the intermediary and risks inhibiting consumers' ability to communicate preferences directly to particular businesses. It also makes intermediary meddling in consumers' expressed privacy choices harder to detect, especially if a consumer makes a choice directly with a business that conflicts with a global opt-out signal set by a browser.

To preserve consumers' ability to exercise granular choices in the marketplace, to keep the regulations' requirements in line with legislative intent in passing the CCPA, and to reduce entrenchment of intermediaries and browsers that have the ability to exercise control over user-enabled privacy settings, we ask the OAG to remove the requirement to honor user-enabled privacy 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.

III. Clarify Financial Incentive Terms So Californians May Continue to Benefit from Consumer Loyalty Programs

The OAG did not take steps to materially clarify the draft rules' financial incentive requirements in its revisions to the proposed regulations. Without additional clarity on this issue, loyalty programs offered in California could be significantly undermined due to business confusion regarding how to implement the regulatory mandates. We respectfully ask the OAG to clarify or remove the rules' ambiguous terms requiring businesses to ensure that financial incentives are reasonably related to the value of a consumer's data. We also ask the OAG to clarify or remove the requirement to disclose an estimate of the value of the consumer's data as well as the method of calculating such value in a notice of financial incentive.

According to the revised proposed rules, "[i]f a business is unable to calculate a good-faith estimate of the value of the consumer's data or cannot show that the financial incentive or price or service difference is reasonably related to the value of the consumer's data, that business shall not offer the financial incentive or price or service difference."¹⁵ Despite this mandate, the draft rules do not provide any helpful information regarding how a business may justify that a price or service difference is reasonably related to the value of a consumer's data. The revised proposed regulations also do not address how businesses may reasonably quantify nontangible value in terms of fostering consumer loyalty and goodwill.

Californians greatly benefit from loyalty and rewards programs and the price differences and discounts they receive for participating in those programs. Loyalty programs exist due to consumers' widespread participation in such programs. Without consumer data, loyalty programs would not be possible. Consumer data increases businesses' access to useful information as well as their ability to generate revenue by marketing their products and services. Allowing consumers to continue to participate in loyalty programs without providing personal information to the business would defeat the purposes of the programs. Consumers who opt out or delete personal information from the loyalty program would essentially be permitted a "free ride" on the program, reaping all of its benefits due to data provided by other consumers. Additionally, it is not immediately apparent how any business can ensure that the program is "reasonably related to the value of the consumer's data." The lack of clarity on this issue and the "free rider" problem enabled by the draft regulations could cause many businesses to decline to continue offering loyalty programs to California residents.

Moreover, the requirement to disclose an estimate of the value of the consumer's data as well as the method of calculating such value in a notice of financial incentive represents a particularly onerous

¹⁵ *Id.* at § 999.336(b).

requirement that would engender consumer confusion and could have anticompetitive effects.¹⁶ Businesses typically offer multiple discounts to consumers through loyalty programs at one time. Requiring businesses to disclose an estimate of the value of the consumer's data and the method of calculating such value would inundate and confuse consumers with multiple and potentially duplicative privacy notices and would provide no tangible consumer benefit. Additionally, disclosing such information in a privacy notice could reveal confidential information about a business and pose risks to the business's competitive position in the market. Forcing businesses to reveal internal and proprietary valuations of data could negatively impact competition and could impose significant risks to business proprietary information.

For the foregoing reasons, we respectfully ask the CA AG to clarify or remove the unreasonably onerous financial incentive requirements inherent in the revised rules. In particular, we ask the OAG to clarify or remove the provisions requiring businesses to disclose a good faith estimate of the value of the consumer's data, disclose their methods of calculating such value, and ensure that financial incentives offered through loyalty programs are reasonably related to the value of the consumer's data. These requirements are particularly unclear and therefore could be impossible to operationalize. Without additional clarity, the draft rules' financial incentive terms could inhibit or drastically reduce the availability of loyalty programs offered in the state.

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Thank you for the opportunity to submit input on the content of the revised proposed regulations implementing the CCPA. We look forward to continuing to engage with the OAG as it takes steps to finalize the draft rules. 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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¹⁶ *Id.* at § 999.307(b)(5).