February 3, 2020

California Attorney General Xavier Becerra
ATTN: Privacy Regulations Coordinator
California Office of the Attorney General
300 South Spring Street, First Floor
Los Angeles, CA 90013

RE: Meeting Request by Ad Trades

Dear Attorney General Becerra:

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, including a significant number of California businesses. Our members engage in responsible data collection and use that benefits consumers and the economy, and we believe privacy deserves meaningful and effective protections in the marketplace. **We respectfully request a meeting with you and/or your staff to discuss several key issues we raised in our individual and joint comment submissions to the California Office of the Attorney General (the "Office") in response to its October 11, 2019 release of draft regulations to implement the California Consumer Privacy Act ("CCPA").**

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 help generate some $767.7 billion dollars for the California economy and support more than 2 million jobs in the state.[1] The companies we represent intend to comply with the CCPA by offering consumers robust privacy protections while simultaneously continuing to be able to do business in ways that benefit California's employment rate and its economy. We believe you intend to construct a regulatory scheme that enables both.

We and our members strongly support the aims and underlying goals of the CCPA, however, we are concerned that certain provisions of the draft regulations issued by the Office could have significant unintended consequences for consumers and the economy. In our analysis, some of the regulations proposed will lead to side effects that will degrade consumer services and, in some cases, detract from consumer privacy rather than enhance it. We are also concerned that the new mandates set forth in the draft rules would impose crippling and onerous obligations on businesses that could bring about the demise of smaller market players and discourage new and start-up entities from entering industries. These effects could have a lasting

[1] IHS Economics and Country Risk, *Economic Impact of Advertising in the United States* (Mar. 2015), *located at* https://www.ana.net/magazines/show/id/rr-2015-ihs-ad-tax.

and detrimental impact on consumers and the California economy, which is a leading economy in the United States and one of the largest in the world.[2]

Our associations submitted input in response to the Office's request for comment on the content of the draft regulations implementing the CCPA.[3] We raised concerns with various new requirements in the draft rules such as the requirement to treat user-enabled browser plugins or privacy settings as valid requests to opt out of personal information sale; the requirement to justify price or service differences offered to consumers and provide an estimate of the value of a consumer's data, which could result in the demise of loyalty programs offered in the state; and the requirement to pass consumer opt-out requests on to third parties. These specific concerns are set forth in additional detail in **Appendix A**, **Appendix B**, and **Appendix C** to this letter.

We request that you consider these concerns and others we raised in our comments when issuing updates to the draft regulations later this year, and we believe further discussion of these issues would be extremely useful to better understand the problems the proposed regulations are trying to solve and work on alternative solutions that are consistent with the letter of the CCPA.

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[2] *See California is now the world's fifth-largest economy, surpassing United Kingdom*, L.A. TIMES, May 4, 2018, located at https://www.latimes.com/business/la-fi-california-economy-gdp-20180504-story.html.

[3] *See* Association of National Advertisers, *Comments of the Association of National Advertisers on the California Consumer Privacy Act Proposed Regulations*, located at https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-comments-45day-pt2.pdf at CCPA_45DAY_00317 - 00342; Interactive Advertising Bureau, *California Consumer Privacy Act Proposed Regulations*, located at https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-comments-45day-pt6.pdf at CCPA_45DAY_01295 - 01312; *and* Network Advertising Initiative, *Proposed Regulations for the California Consumer Privacy Act of 2018*, located at https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-comments-45day-pt4.pdf at CCPA_45DAY_00826 – 00852. *See also Joint Advertising Trade Association Comments on Proposed CCPA Regulations*, located at https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-comments-45day-pt2.pdf at CCPA_45DAY_00272 - 00284. Our associations also submitted joint comments during the Office's preliminary rulemaking period. *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 CCPA00000431 - 00000442.

We and our members support California's intent to provide consumers with improved privacy protections, but the draft rules implementing CCPA contain many provisions that extend beyond the text of the law itself and stand to negatively impact consumers and businesses alike. We therefore request a meeting with you to further explain our concerns with the draft regulations that we outline in the appendices that follow this letter, and to work toward solutions that all of California's citizens and employers can embrace.

If you would like to schedule a meeting or discuss this request, please contact Mike Signorelli at 202-344-8050.

Sincerely,

Dan Jaffe
Group EVP, Government Relations
Association of National Advertisers

Alison Pepper
Senior Vice President
American Association of Advertising Agencies, 4A's

Christopher Oswald
SVP, Government Relations
Association of National Advertisers

David Grimaldi
Executive Vice President, Public Policy
Interactive Advertising Bureau

David LeDuc
Vice President, Public Policy
Network Advertising Initiative

Clark Rector
Executive VP-Government Affairs
American Advertising Federation

CC: Mike Signorelli, Venable LLP
Allie Monticollo, Venable LLP

APPENDIX A
BROWSER PLUGINS

OVERVIEW. The proposed regulations implementing the California Consumer Privacy Act ("CCPA") would require businesses to honor user-enabled browser plugins or other privacy settings as requests to opt out of personal information sale, even though such mechanisms may not reflect consumer preferences or allow them to make granular choices. We ask the California Attorney General ("OAG") to allow businesses to have flexibility to honor either user-enabled browser settings or provide a "Do Not Sell My Personal Information" link to another mechanism for consumers to opt out of the sale of personal information by the business.

SUMMARY OF PROPOSED REGULATIONS. The proposed regulations would require a business that collects personal information from consumers online to "treat user-enabled privacy controls, such as a browser plugin or privacy setting or other mechanism, that communicate or signal the consumer's choice to opt-out of the sale of their personal information as a valid request submitted pursuant to Civil Code section 1798.120 for that browser or device, or, if known, for the consumer." Cal. Code Regs. tit. 11, § 999.315(c) (proposed).

SUMMARY OF REQUEST. This requirement represents an entirely new obligation for businesses, does not further the purposes of the CCPA, and stands to impede meaningful consumer choice. Privacy controls such as browser plugins and other privacy mechanisms are often default settings that are put in place by an intermediary, such as a browser or operating system, and not the consumer. These mechanisms are blunt instruments that broadcast a single signal to all businesses, thereby obstructing consumers' ability to make specific, business-by-business choices to allow certain entities to "sell" data while restricting others. The California legislature explicitly considered browser settings when it amended the California Online Privacy Protection Act in 2013 and rejected a single, technical-based approach to effectuating consumer choice. AB 370 (Cal. 2013). In addition, the California legislature could have included a browser mandate in the CCPA when it passed the law in June of 2018, or when it amended it via several bills thereafter, but each time chose not to impose such a requirement. Forcing businesses to honor the signals set by an intermediary constitutes an entirely new requirement that was not approved by the legislature. Additionally, this requirement could harm consumers by thwarting their ability to exercise granular, discrete choices and maximize their enjoyment of and participation in the digital marketplace.

Moreover, privacy controls such as browser plugins and other privacy mechanisms of this type are ripe for tampering by intermediaries. Some browsers, operating systems, and other intermediaries have the ability to interfere with consumers' ability to use choice tools via the Internet. This interference can occur when these intermediaries block the technology that is used to signal an opt out, such as cookies, mobile ad identifiers, JavaScript and others. When browsers or other intermediaries impede such technological opt out mechanisms from functioning properly, consumers are ultimately harmed because their opt out preferences fail to be communicated to businesses. If consumers are unable to deliver a choice signal to a business due to an intermediary's blockage of the technology used to communicate that signal, consumers are prevented from exercising meaningful choice in the marketplace. We therefore ask the OAG

to update the draft rules so that consumers' choices are not blocked by intermediaries' interference with the technology provided to consumers to help consumers set their preferences.

Regardless of the mechanism offered to effectuate a consumer opt out, the OAG's regulations should protect the signal set by the consumer.

We suggest an update to the proposed regulations that would require businesses to honor such browser plugins or privacy settings or mechanisms ***or*** allow businesses not to honor such settings if they include a "Do Not Sell My Personal Information" link and offer another mechanism or protocol for opting out of the sale of personal information.

BENEFITS FOR CONSUMERS AND BUSINESSES. Consumers would gain from this approach because it enables them to set granular, business-by-business preferences regarding the sale of personal information. This solution would save consumers from being forced to accept default browser plugins or privacy settings that would apply to every entity in the online ecosystem and interfere with their ability to access the services and content they want. In addition, consumers would not suffer from an intermediary's purposeful or inadvertent blockage of the technology used to signal an opt out choice. Businesses would also benefit from the additional clarity that would accompany an update to the regulations stating that a business may not honor user-enabled browser plugins or other privacy settings if it provides a "Do Not Sell" link and another mechanism for consumers to opt out of the sale of their personal information. Such flexibility creates certainty for businesses and will empower consumers to express their choices effectively.

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APPENDIX B
LOYALTY PROGRAMS

OVERVIEW. The proposed regulations implementing the California Consumer Privacy Act ("CCPA") contain provisions governing the provision of financial incentives and price or service differences to consumers that could jeopardize the availability of loyalty and rewards programs for Californians. We ask the California Attorney General ("OAG") to clarify these provisions and remove certain particularly burdensome notice requirements regarding financial incentives so businesses may continue to offer loyalty and rewards programs to California consumers.

SUMMARY OF PROPOSED REGULATIONS. The proposed regulations allow a business to offer a price or service difference to a consumer in exchange for the retention or sale of personal information if the price or service difference is "reasonably related to the value of the consumer's data." Cal. Code Regs. tit. 11, § 999.336(b) (proposed). The "value of the consumer's data" is the value provided to the business by the consumer's data. *Id*. at § 999.337(a) (proposed). Additionally, the proposed regulations require a business offering a price or service difference to provide a notice of financial incentive explaining the price or service difference, which must include a "good-faith estimate of the value of the consumer's data that forms the basis for offering the financial incentive or price or service difference" and a "description of the method the business used to calculate the value of the consumer's data." *Id*. at § 999.307(b)(5) (proposed).

SUMMARY OF REQUEST. The proposed regulations' requirements for businesses that offer financial incentives and price and service differences risk reducing or eliminating the availability of loyalty and rewards programs for Californians. Consumers participate in loyalty and rewards programs on an opt-in basis, and they understand that data makes loyalty programs possible. Consumers obtain significant value through those programs by gaining access to lower prices and special offers. Loyalty programs are ubiquitous across the online and offline marketplaces for products and services, and they take many different forms. For example, gas dollar programs, frequent flyer programs, grocery "valued customer" rewards, and many other similar offerings constitute loyalty programs that could be hindered or eliminated in California due to the CCPA and the proposed regulations' financial incentive requirements.

Requiring businesses to justify the price or service differences they offer to consumers by ensuring that they are reasonably related to the value of a consumer's data does not fairly recognize the complex nature of valuing data, particularly when accounting for intangible values such as goodwill, or the valuation of data over time that may vary depending on its use or incentives offered to consumers. Additionally, businesses may value financial incentives and data on an aggregate basis rather than on an individual consumer level, which would make it difficult—if not impossible—for a business to ensure that a price or service difference is "reasonably related to the value of the [particular] consumer's data." *Id*. at § 999.337(a). It is also unclear how businesses should quantify nontangible value created through rewards programs in terms of fostering consumer loyalty and goodwill.

The proposed regulations' requirements for notices of financial incentives also present challenges that could hinder the provision of loyalty programs to California consumers. Requiring businesses to include a good-faith estimate of the value of the consumer's data and a

description of the method the business used to calculate such value in a notice does not consider the fact, as noted above, that businesses often value data on an aggregate rather than an individual level. Furthermore, the methods businesses use to calculate the value of data may constitute confidential or proprietary information that, if divulged, could jeopardize a business's competitive position in the marketplace. Several varying and potentially proprietary considerations may go into calculating the value of consumer data and the financial incentive to be offered by a business, which, if disclosed to consumers in a notice, would likely cause confusion for consumers rather than enlighten them to business practices.

For these reasons, we ask the OAG to clarify that a business may justify that a price or service difference is reasonably related to the value provided to the business by the aggregate value of consumers' data so businesses may continue to offer loyalty programs to California consumers. In addition, we ask the OAG to update the proposed rules so that businesses are not required to disclose the method by which they calculate the value of the consumer's data or the actual estimated value in a notice, or, at the very least, clarify that businesses may satisfy this notice requirement by providing an estimate of the aggregate value of consumer data instead of an estimate of the value pertaining to an individual consumer.

BENEFITS FOR CONSUMERS AND BUSINESSES. Consumers would gain from this approach because it would enable businesses to continue to provide loyalty and rewards programs that Californians benefit from and expect. Consumers clearly see the value of such programs, as demonstrated by the broad participation in them by both California consumers and the country at-large. Additionally, our requested changes would reduce the possibility of consumer confusion stemming from required notices of financial incentives. Businesses would also gain from this approach, because it would enable them to continue to provide rewards programs to the California market and would help ensure that they are not required to reveal proprietary and confidential information about their valuation practices to the public.

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APPENDIX C
90-DAY OPT-OUT REQUIREMENT

OVERVIEW. The proposed regulations implementing the California Consumer Privacy Act ("CCPA") would require businesses to pass consumer opt-out requests on to third parties and instruct those third parties not to further sell personal information. This requirement could cause unintended effects and thwart consumer expectations by applying a single opt-out request to many businesses throughout the data ecosystem. We therefore ask the California Attorney General ("OAG") to remove this entirely new requirement from the proposed rules.

SUMMARY OF PROPOSED REGULATIONS. Upon receipt of an opt out request, the proposed regulations would require a business to "notify all third parties to whom it has sold the personal information of the consumer within 90 days prior to the business's receipt of the consumer's request that the consumer has exercised their right to opt-out and instruct them not to further sell the information. The business shall notify the consumer when this has been completed." Cal. Code Regs. tit. 11, § 999.315(f) (proposed).

SUMMARY OF REQUEST. Requiring businesses to pass on opt out requests to third parties could impede a consumer's ability to exercise specific choices that are effective against particular businesses. This directive in the proposed rules would interpret a consumer's opt out request served on a single business as a request that should apply across the whole marketplace. A consumer's choice to opt out of one business's ability to sell personal information does not mean that the consumer meant to opt out of *every* business's ability to sell personal information or that they were aware of this significant impact. The proposed regulations have the potential to cause consumers to lose access to offerings and content that they did not expect or choose to lose by submitting an opt out request to a single business. The CCPA and the proposed regulations should not require businesses to understand a consumer's single opt out choice as a decision that must apply to the entire data ecosystem.

Additionally, obligating businesses to communicate opt out requests to third parties is a substantial new obligation that did not give businesses enough time to build processes to comply with the requirement before the CCPA's effective date of January 1, 2020 nor would it provide the time to respond effectively to requirements that will flow from the OAG's rulemaking. The CCPA itself already provides a means for consumers to control onward sales of personal information by third party businesses by ensuring that consumers are given explicit notice and an opportunity to opt out of the sale. Cal. Civ. Code § 1798.115(d). The proposed regulations' requirement to pass opt out requests on to third parties that received the consumer's personal information within the past 90 days represents an entirely new obligation that moves beyond the text and intent of the California legislature in passing the CCPA. We therefore ask the OAG to update the proposed rules so businesses are not required to pass opt out requests along to third parties.

BENEFITS FOR CONSUMERS AND BUSINESSES. Consumers would gain from this approach because the opt out requests they serve on individual businesses will not carry through to the entire marketplace or deprive them of online offerings and services they did not expect to lose. This update would therefore better align with a reasonable consumer's expectation upon submitting an opt out request to a single business. Businesses would benefit from this approach

as well because they would not be required to engage in the additional and considerably burdensome process of communicating opt out requests to third parties.

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