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

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[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

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[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

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[10] *See Assembly Committee on Business, Professions and Consumer Protection*, Hearing Report on AB 370 (Cal. 2013) (Apr. 16, 2013), located at https://leginfo.legislature.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

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[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 [redacted] with any questions you may have regarding these comments.

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
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David LeDuc
Vice President, Public Policy
Network Advertising Initiative

Clark Rector
Executive VP-Government Affairs
American Advertising Federation

Lou Mastria
Executive Director
Digital Advertising Alliance

[17] Cal. Civ. Code § 1798.135(a)(5).

October 28, 2020

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

RE: Third Set of Proposed Modifications to Text of California Consumer Privacy Act Regulations

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 third set of proposed modifications to the text of the California Consumer Privacy Act ("CCPA") regulations.[1]

As explained in more detail below, the OAG's proposed modifications: (1) unreasonably restrict consumers from receiving important information about their privacy choices, (2) prescriptively describe how businesses must provide offline notices, and (3) unfairly fail to hold authorized agents to the same consumer notice standards as businesses. The OAG's potential changes to Section 999.315 would inhibit consumers from receiving transparent information and impinge on businesses' right to free speech. In addition, the proposed modifications to Section 999.326 would not provide any protections for consumers related to their communications with authorized agents, as such agents are not presently held to similar consumer notice rules as businesses. Finally, the OAG's proposed edits to Section 999.306 could stymie the flexibility businesses need to provide effective offline notices to consumers. We consequently ask the OAG to strike or modify the modifications per the below comments.

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 expenditures. 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 comment submissions and in the sections that follow below, the draft regulations implementing the law should be updated to better enable consumers to exercise informed choices and to help businesses in their efforts to continue to provide value to California consumers while also supporting the state's economy.[3]

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[1] *See* California Department of Justice, *Notice of Third Set of Proposed Modifications to Text of Regulations* (Oct. 12, 2020), located at https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-notice-of-third-mod-101220.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/privacy/oal-sub-45day-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/oal-sub-15day-comments-set1.pdf at CCPA_15DAY_000554 - 000559; *Second Set of Proposed Regulations Implementing the California*

Our members are committed to offering consumers robust privacy protections while simultaneously providing access to ad-funded news, apps, and a host of additional online services. These are offerings we have all become much more dependent on in recent months with the widespread proliferation of the COVID-19 pandemic. Ad-supported online content services have been available to consumers and will continue to be available to consumers so long as laws allow for innovation and flexibility without unnecessarily tilting the playing field away from the ad-subsidized model. The most recent modifications to the CCPA regulations set forth a prescriptive interpretation of the CCPA that could limit our members' ability to support California's employment rate and its economy in these unprecedented times. We believe a regulatory scheme that offers strong individual privacy protections and enables continued economic advancement will best serve Californians. The suggested updates we offer in this letter would improve the CCPA regulations for Californians as well as the economy.

I. The Data-Driven and Ad-Supported Online Ecosystem Benefits Consumers and Fuels Economic Growth

The U.S. economy is fueled by the free flow of data. Throughout the past three decades of the commercial Internet, one driving force in this ecosystem has been data-driven advertising. Advertising has helped power the growth of the Internet by delivering new, innovative tools and services for consumers and businesses to connect and communicate. Data-driven advertising supports and subsidizes the content and services consumers expect and rely on, including video, news, music, and more. Data-driven advertising allows consumers to access these resources at little or no cost to them, and it has created an environment where small publishers and start-up companies can enter the marketplace to compete against the Internet's largest players.

As a result of this responsible advertising-based model, U.S. businesses of all sizes have been able to grow online and deliver widespread consumer and economic benefits. According to a March 2017 study entitled *Economic Value of the Advertising-Supported Internet Ecosystem*, which was conducted for the IAB by Harvard Business School Professor John Deighton, in 2016 the U.S. ad-supported Internet created 10.4 million jobs.[4] This means that the interactive marketing industry contributed $1.121 trillion to the U.S. economy in 2016, doubling the 2012 figure and accounting for 6% of U.S. gross domestic product.[5]

Consumers, across income levels and geography, embrace the ad-supported Internet and use it to create value in all areas of life, whether through e-commerce, education, free access to valuable content, or the ability to create their own platforms to reach millions of other Internet users. In a September 2020 survey conducted by the Digital Advertising Alliance, 93 percent of consumers stated that free content was important to the overall value of the Internet and more than 80 percent surveyed stated they prefer the existing ad-supported model, where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.[6] The survey also found that consumers estimate the personal value of ad-supported content and services on an annual basis to be $1,403.88, representing an increase of over $200 in value since 2016.[7] Consumers are increasingly aware that the data collected about their interactions on the web, in mobile applications, and in-store are used to create an enhanced and tailored

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Consumer Privacy Act, located at https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/oal-sub-45day-comments.pdf at CCPA_2ND15DAY_00309 - 00313.

[4] John Deighton, *Economic Value of the Advertising-Supported Internet Ecosystem* (2017), located at https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-2017-FINAL2.pdf.

[5] *Id.*

[6] Digital Advertising Alliance, *SurveyMonkey Survey: Consumer Value of Ad Supported Services – 2020 Update* (Sept. 28, 2020), located at https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/Consumer-Value-Ad-Supported-Services-2020Update.pdf.

[7] *Id.*

experience, and research demonstrates that they are generally not reluctant to participate online due to data-driven advertising and marketing practices.

Without access to ad-supported content and online services, many consumers would be unable or unwilling to participate in the digital economy. Indeed, as the Federal Trade Commission noted in its recent comments to the National Telecommunications and Information Administration, if a subscription-based model replaced the ad-based model, many consumers likely would not be able to afford access to, or would be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.[8] The ad-supported Internet therefore offers individuals a tremendous resource of open access to information and online services. Without the advertising industry's support, the availability of free and low-cost vital online information repositories and services would be diminished. We provide the following comments in the spirit of preserving the ad-supported digital and offline media marketplace that has provided significant benefit to consumers while helping to design appropriate privacy safeguards to provide appropriate protections for them as well.

II. The Regulations Should Support Consumers' Awareness of the Implications of Their Privacy Decisions, Not Hinder It in Violation of the First Amendment

The proposed online and offline modifications unreasonably limit consumers' ability to access accurate and informative disclosures about business practices as they engage in the opt out process. Ultimately, this restriction on speech would not benefit consumers or advance a substantial interest. The proposed rules state: "Except as permitted by these regulations, a business shall not require consumers to click through or listen to reasons why they should not submit a request to opt-out before confirming their request."[9] This language unduly limits consumers from receiving important information as they submit opt out requests. It is also overly limiting in the way that businesses may communicate with consumers. As highlighted above, data-driven advertising provides consumers with immensely valuable digital content for free or low-cost, as well as critical revenue for publishers, by increasing the value of ads served to consumers. As the research cited above also confirms, consumers have continually expressed their preference for ad-supported digital content and services, rather than having to pay significant fees for a wide range of apps, websites, and internet services they use. However, as a result of the proposed modifications, consumers' receipt of factual, critical information about the nature of the ad-supported Internet would be unduly hindered, thereby undermining a consumer's ability to make an informed decision. A business should be able to effectively communicate with consumers to inform them about how and why their data is used, and the benefit that data-driven advertising provides as a critical source of revenue.

It is no secret that consumers greatly value the information they can freely access online from digital publishers. However, local news publishers, for instance, continue to struggle to get readers to pay subscription fees for their content, even though this content is highly valuable to consumers and society. Thus, most news publishers have become increasingly reliant on tailored advertising, because it provides greater revenue than traditional advertising. However, the proposed modifications, as drafted, could obstruct consumers from receiving truthful, important information by hindering a business' provision of a reasonable notice to consumers about the funding challenges opt outs pose to their business model.

The CCPA regulations should not prevent consumers from receiving and businesses from providing full, fair, and accurate information during the opt out process. The proposed modification would

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[8] Federal Trade Commission, *In re Developing the Administration's Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

[9] Cal. Code Regs. tit 11, § 999.315(h)(3) (proposed Oct. 12, 2020).

impede consumers from receiving important information about their privacy choices, such as information about the vital nature of the ad-supported Internet as described in Section I, and, as explained in Section III, they may be contemporaneously receiving partial or misleading negative information about their opt out rights.

To ensure a fully informed privacy choice, consumers must have every ability to access information about business practices and the benefits of the digital advertising ecosystem. Providing ample and timely opportunities for consumers to gain knowledge about their choice to opt out is of paramount importance to avoid confusion and ignorance; this allows a consumer to be fully informed about the actual implications of their decision. By prohibiting a business from requiring a consumer to "to click through or listen to reasons why they should not submit a request to opt-out *before* confirming their request" the regulations do not safeguard against this concern. As presently written, the proposed modification appears to limit businesses' ability to provide such vital information as a consumer is opting out, even if such information is presented in a seamless way. It is unclear what amount of information, or what method in which such information is presented, could constitute a violation of the rules. Instead of setting forth prohibitive rules that could reduce the amount of information and transparency available to consumers online, the OAG should prioritize facilitating accurate and educational exchanges of information from businesses to consumers. As a result, we ask the OAG to revise the text of the proposed modification in Section 999.315(h)(3) so that businesses are permitted to describe the impacts of an opt out choice while facilitating the consumer's request to opt out.

Additionally, the restrictions created by this proposed modification infringe on businesses' First and Fourteenth Amendment right to commercial speech. As written, Section 999.315(h)(3) restricts the information consumers can receive from businesses as they submit opt out requests by limiting the provision of accurate and truthful information to consumers. The Supreme Court has explained that "people will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ."[10] Because this proposed regulation prescriptively regulates channels of communication, it violates the First and Fourteenth Amendments.

The state may not suppress speech that is "neither misleading nor related to unlawful activity" unless it has a substantial interest in restricting this speech, the regulation directly advances that interest, and the regulation is narrowly tailored to serve that interest.[11] The proposed regulation fails each part of the test:

- ***No substantial interest:*** Although there is no stated justification in the proposal, the most likely interest would be to streamline opt out requests by making it easier and faster to submit opt-outs. The OAG presumably wants nothing to impede consumers from opting out, but it is unclear because the OAG has not affirmatively stated its purpose for the proposed modification. Consumers should be made aware of the ramifications of their opt out decisions as they are opting out – not after confirming a request – so they do not make opt out choices to their detriment because they do not know the effect of such choices. For this reason, they should be able to receive information from businesses about the consequences of their opt out choices as they are submitting opt out requests. Providing information concerning the impact of an opt out is not an impediment to the process, but rather improves it.

[10] *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U. S. 748, 770 (1976).
[11] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980); *see also Individual Reference Services Group, Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001).

- ***No advancement of the interest:*** If streamlining opt out requests to remove perceived impediments is the justification for the proposed rule, then the proposal does not advance that interest. The proposed regulation already includes many other specific requirements that facilitate speed and ease of opt-outs, including a requirement to use the minimal number of steps for opt-outs (and no more than the number of steps needed to opt in), prohibiting confusing wording, restricting the information collected, and prohibiting hiding the opt-out in a longer policy, all of which directly advance this interest without suppressing speech. The proposed rule limiting businesses from clicking through or listening to reasons would not make the opt out process easier for consumers, because it could result in consumers making uninformed choices if they are not notified of the consequences of their decision to opt out as they are making it. A "regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[12] This proposed regulation is both ineffective and provides no support for the government's purpose.

- ***Not narrowly tailored:*** The proposed regulation is an overly broad and prescriptive restriction on speech that hinders accurate and educational communications to consumers about the consequences of a decision to opt-out. The regulations already include various other provisions that work to streamline the opt out process. "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[13] As noted above, there are many ways to craft regulations to require simple and fast opt-out mechanisms that do not suppress lawful and truthful speech.

In sum, the regulation violates each and every prong of the framework for evaluating commercial speech. "As in other contexts, these standards ensure not only that the state's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message."[14] The proposed regulation would do exactly that. Thus, it is a content-based restriction on speech, subject to heightened scrutiny. The OAG should revise the text of the proposed modification in Section 999.315(h)(3) to avoid running afoul of the First and Fourteenth Amendments and to ensure consumers may receive information about the impacts of an opt out request as they engage in the opt out process with a business.

III. The Proposed Modifications Should Impose the Same Notice Requirements on Authorized Agents as They Impose on Businesses

The proposed modifications to the CCPA regulations would require a business to ask an authorized agent for proof that a consumer gave the agent signed permission to submit a rights request.[15] Although this provision helps ensure businesses can take steps to verify that authorized agents are acting on the true expressed wishes of consumers, the proposed modifications do not offer consumers sufficient protections from potential deception by authorized agents. For example, while the proposed modifications would impose additional notice obligations on businesses,[16] those requirements do not extend to authorized agents. Authorized agents consequently have little to no guidelines or rules they must follow with respect to their communications with consumers, while businesses are subject to onerous, highly restrictive requirements regarding the mode and content of the information they may provide to Californians. The asymmetry between the substantial disclosure obligations for businesses and the lack thereof for authorized agents could enable (and, in fact, could incentivize) some agents to give consumers misleading

[12] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).
[13] *Id.*
[14] *Sorrell v. IMS Health Inc.*, 564 U.S. 572, 565 (2011).
[15] Cal. Code Regs. tit. 11, § 999.326(a) (proposed Oct. 12, 2020).
[16] *Id.* at § 999.315(h)(3).

or incomplete information. We encourage the OAG to take steps to modify the proposed modifications to the CCPA regulations in order to equalize the notice requirements placed on businesses and agents, thus ensuring consumers can act on an informed basis under CCPA. In Section II of this submission, we discuss related First Amendment and communications fairness issues implicit in a balanced consumer privacy notice regime.

IV. Proposed Modifications to the CCPA Regulations Should Enable Flexibility in Methods of Providing Offline Notice

The proposed modifications to the CCPA regulations related to offline notices present a number of problems for consumers and businesses. As written, the CCPA implementing regulations already provide sufficient guidance to businesses regarding the provision of offline notice at the point of personal information collection in brick-and-mortar stores.[17] The proposed modifications are more restrictive and prescriptive than the current plain text of the CCPA regulations, would restrict businesses' speech, would remove the flexibility businesses need to effectively communicate information to their customers, and would unnecessarily impede business-consumer interactions. We therefore ask the OAG to update the proposed modifications to: (1) remove the proposed illustrative example associated with brick-and-mortar stores, and (2) explicitly enable businesses communicating with Californians by phone to direct them to an online notice where CCPA-required disclosures are made to satisfy their offline notice obligation, a medium which is more familiar to consumers for these sorts of disclosures along with having the added benefit of being able to present additional choices to the consumer.

The proposed modifications would require businesses that collect personal information when interacting with consumers offline to "provide notice by an offline method that facilitates consumers' awareness of their right to opt-out."[18] The proposed modifications proceed to offer the following "illustrative examples" of ways businesses may provide such notice: through signage in an area where the personal information is collected or on the paper forms that collect personal information in a brick-and-mortar store, and by reading the notice orally when personal information is collected over the phone.[19] While the illustrative examples set forth limited ways businesses can give notice in compliance with the CCPA, they are more restrictive than existing provisions of the CCPA regulations and detract from the flexibility businesses need to provide required notices that do not burden consumers or cause unreasonable friction or frustration during the consumer's interaction with the business.

The illustrative example related to brick-and-mortar store notification sets forth redundant methods by which businesses may provide notices in offline contexts. The CCPA regulations already address such methods of providing offline notice at the point of personal information collection by stating, "[w]hen a business collects… personal information offline, it may include the notice on printed forms that collect personal information, provide the consumer with a paper version of the notice, or post prominent signage directing consumers to where the notice can be found online."[20] The proposed modifications regarding notice of the right to opt out in offline contexts are therefore unnecessary, as the regulations already address the very same methods of providing offline notice and offer sufficient clarity and flexibility to businesses in providing such notice.

In addition, the proposed modifications related to brick-and-mortar store notification are overly prescriptive. They include specific requirements about the *proximity* of the offline notice to the area where personal information is collected in a store. The specificity of these illustrative examples could result in

[17] Cal. Code Regs. tit. 11, § 999.305(a)(3)(c).
[18] Cal. Code Regs. tit. 11, § 999.306(b)(3) (proposed Oct. 12, 2020).
[19] *Id.*
[20] Cal. Code Regs. tit. 11, § 999.305(a)(3)(c).

over-notification throughout a store as well as significant costs. For example, the proposed modification could be interpreted to require signage at each cash register in a grocery store, as well as signage at the customer service desk, in the bakery area of the store where consumers can submit requests for cake deliveries, and in any other location where personal information may be collected. They also do not account for different contexts of business interactions with consumers. A business operating a food truck, for instance, would have different offline notice capabilities than an apparel store. A single displayed sign in a brick-and-mortar store, or providing a paper version of notice, would in most instances provide sufficient notice to consumers of their right to opt out under the CCPA. Bombarding consumers with physical signs at every potential point of personal information collection could be overwhelming and would ultimately not provide consumers with more awareness of their privacy rights. In fact, this strategy is more likely to create privacy notice fatigue than any meaningful increase in privacy control, thus undercutting the very goals of the CCPA.

Additionally, the proposed modifications' illustrative example of providing notice orally to consumers on the phone appears to suggest that reading the full notice aloud is the only way businesses can provide CCPA-compliant notices via telephone conversations. Reading such notice aloud to consumers would unreasonably burden the consumer's ability to interact efficiently with a business customer service representative and would likely result in consumer annoyance and frustration. Requiring businesses to keep consumers on the phone for longer than needed to address the purpose for which the consumer contacted the business would introduce unneeded friction into business-consumer relations. Instead, businesses should be permitted to direct a consumer to an online link where information about the right to opt out is posted rather than provide an oral catalog of information associated with particular individual rights under the CCPA.

The proposed modifications' addition of illustrative examples regarding methods of offline notice is unnecessary, redundant, and inflexible. These modifications would result in consumer confusion, leave businesses wondering if they may take other approaches to offline notices, and if so, how they may provide such notice within the strictures of the CCPA. We therefore ask the OAG to remove the proposed illustrative example associated with brick-and mortar stores as well as clarify that businesses communicating with consumers via telephone may direct them to an online website containing the required opt out notice as an acceptable way of communicating the right to opt out.

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Thank you for the opportunity to submit input on the content of the proposed modifications to the CCPA regulations. Please contact Mike Signorelli of Venable LLP at [redacted] with any questions you may have regarding these comments.

Sincerely,

Dan Jaffe
Group EVP, Government Relations
Association of National Advertisers

Alison Pepper
Executive Vice President, Government Relations
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

Lou Mastria
Executive Director
Digital Advertising Alliance

December 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: Fourth Set of Proposed Modifications to Text of California Consumer Privacy Act Regulations

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 fourth set of proposed modifications to the text of the California Consumer Privacy Act ("CCPA") regulations.[1]

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 expenditures. 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]

For more than a year, our members have been communicating with consumers about their CCPA rights and how to effectuate them. As a result, our members have experience in operating under the CCPA and interacting with consumers. We have learned valuable insights about how to support consumer privacy rights under this new legal regime, including that operational flexibility is vital.

Not all interactions with consumers are the same nor are all business operations. There is no "one-size fits all" approach to the CCPA. 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 comment submissions and in this letter, the draft regulations implementing the CCPA should be updated to provide greater clarity, better enable consumers to exercise informed choices, and help businesses in their efforts to continue to provide value to Californians and support the state's economy.[3]

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[1] *See* California Department of Justice, *Notice of Fourth Set of Proposed Modifications to Text of Regulations and Addition of Documents and Information to Rulemaking File* (Dec. 10, 2020), located at https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-notice-4th-set-mods.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/privacy/oal-sub-45day-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/oal-sub-15day-comments-set1.pdf at CCPA_15DAY_000554 - 000559; *Second Set of Proposed Regulations Implementing the California Consumer Privacy Act,* located at https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/oal-sub-45day-comments.pdf at CCPA_2ND15DAY_00309 - 00313; *Third Set of Proposed Regulations Implementing the California Consumer*

Companies and consumers have been adapting to the "Do Not Sell My Personal Information" tagline for more than a year. This effort has included refashioning digital properties, as well as instituting backend processes to meet the compliance requirements of the CCPA even as a new ballot initiative, the California Privacy Rights Act (or "Proposition 24"), was moving forward. These most recent proposed modifications by the OAG to the CCPA regulations set forth ambiguous terms surrounding a proposed online button almost a full year after the law went into effect. Among other things, this round of modifications fails to clarify whether the button is optional or mandatory. The proposed changes also do not leave room for the deployment of alternative icons, such as the CCPA Privacy Rights Icon in market provided by the Digital Advertising Alliance ("DAA"),[4] or other methods, such as a text only link in applicable scenarios, to facilitate consumers' right to opt out of personal information sales. The OAG should reconsider these provisions, or at the very least clarify them so businesses can take steps to comply with the new terms as soon as possible.

Additionally, changes the OAG made during the third set of proposed modifications to the CCPA regulations set forth a prescriptive interpretation of the law that could limit businesses' ability to support employment in California and the state's economy during these unprecedented times. We reassert the issues we previously raised with those provisions in this submission. As explained in more detail in the sections that follow below, the OAG's potential changes to Section 999.315 would inhibit consumers from receiving transparent information and impinge on businesses' right to free speech. In addition, the proposed modifications to Section 999.326 would not provide any protections for consumers related to their communications with authorized agents, as such agents are not presently held to similar consumer notice rules as businesses. Finally, the OAG's proposed edits to Section 999.306 regarding offline notice of the right to opt out could stymie the flexibility businesses need to provide effective offline notices to consumers. We consequently ask the OAG to strike or modify these changes per the below comments.

Our members are committed to offering consumers robust privacy protections while simultaneously providing them with access to ad-funded news, apps, and a host of additional online services. These are offerings we have all become much more dependent on in recent months with the widespread proliferation of the COVID-19 pandemic. Ad-supported online content and services have been available to consumers and will continue to be available to consumers so long as laws allow for innovation and flexibility without unnecessarily tilting the playing field away from the ad-subsidized model. We believe a regulatory scheme that offers strong individual privacy protections and enables continued economic advancement will best serve Californians. The suggested updates we offer in this letter would improve the CCPA regulations for Californians as well as protect the economy.

I. The Regulations Should Clarify That the Proposed New Button is Discretionary and Not Preclude Use of Other Icons Presented in Conjunction with the Text Link

In the fourth set of proposed modifications to the CCPA regulations, the OAG reinserted terms setting forth a specific graphic for a button enabling consumers to opt out of personal information sales. The proposed modifications state that the proposed button "*may* be used" in addition to posting a notice of the right to opt-out online, but not in lieu of such notice or the "Do Not Sell My Personal Information" link.[5] In the very next subsection, the proposed rules state that when a business provides a "Do Not Sell My Personal Information" link, the proposed button "*shall* be added to the left" of the link.[6] The language describing the proposed button is thus unclear, as it does not adequately explain whether providing the

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Privacy Act, located at https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-written-comm-3rd-15-day-period.pdf at CCPA_3RD15DAY_00111 - 00118.

[4] DAA, *Opt Out Tools,* located at https://www.privacyrights.info/.

[5] Cal. Code Regs. tit. 11, § 999.306(f)(1) (proposed Dec. 10, 2020) (emphasis added).

[6] *Id.* at § 999.306(f)(2) (emphasis added).

button is discretionary or mandatory for businesses that sell personal information. We ask the OAG to confirm that the proposed button is discretionary as well as to provide flexibility for businesses to use alternative, industry-developed icons that signal the right to opt out of personal information sales to California consumers.

As the founding members of the DAA YourAdChoices program and corresponding icon,[7] we understand the benefits a widely recognizable icon can bring to provide transparency and choices to consumers. In fact, in November 2019, the DAA announced its creation of a tool and corresponding Privacy Rights Icon to provide consumers with a clear and recognizable mechanism to opt out of personal information sales under the CCPA.[8] Icons and corresponding privacy programs created by the DAA have a history of success. The YourAdChoices icon has been served globally at a rate of more than one trillion times per month, and its recognition continues to grow. In a 2016 survey, more than three in five respondents (61 percent) recognized the YourAdChoices icon at least a little, and half (50 percent) said they recognized it a lot or somewhat. For the CCPA, there is a need for flexibility in how this novel law is implemented in the market. The OAG should allow the marketplace to determine the best opt-out button approach, including allowing the option for use of an icon promulgated in relation to industry-driven opt-out mechanisms, rather than creating uncertainty by mandating a new graphic that businesses must use.

Moreover, adding the button as a requirement now, nearly a year after the CCPA became effective and more than five months after the OAG began enforcing the law, would create unnecessary new compliance costs for businesses to reconfigure websites and consumer-facing properties after they have already taken significant steps to update their practices per the CCPA's requirements. We therefore ask the OAG to clarify that the new opt-out button is discretionary rather than mandatory, and businesses that provide a "Do Not Sell My Personal Information" link are not required to also provide the proposed button. We also ask the OAG to provide flexibility for businesses to utilize other icons to signal a consumer's right to opt out of personal information sales, such as the DAA's CCPA Privacy Rights Icon. The OAG should reconsider the need to create new iconography and should instead partner with industry on the already existing DAA Privacy Rights Icon to help lead consumers to choices about how their personal information is used and shared.

II. The Regulations Should Support Consumers' Awareness of the Implications of Their Privacy Decisions, Not Hinder It in Violation of the First Amendment

The proposed online and offline modifications unreasonably limit consumers' ability to access accurate and informative disclosures about business practices as they engage in the opt out process. Ultimately, this restriction on speech would not benefit consumers or advance a substantial interest. The proposed rules state: "Except as permitted by these regulations, a business shall not require consumers to click through or listen to reasons why they should not submit a request to opt-out before confirming their request."[9] This language unduly limits consumers from receiving important information as they submit opt out requests. It is also overly limiting in the way that businesses may communicate with consumers. As highlighted above, data-driven advertising provides consumers with immensely valuable digital content for free or low-cost, as well as critical revenue for publishers, by increasing the value of ads served to consumers. As the research cited above also confirms, consumers have continually expressed their preference for ad-supported digital content and services, rather than having to pay significant fees for a wide range of apps, websites, and internet services they use. However, as a result of the proposed modifications, consumers' receipt of factual, critical information about the nature of the ad-supported

[7] Digital Advertising Alliance, *YourAdChoices*, located at https://youradchoices.com/.
[8] DAA, *Digital Advertising Alliance Announces CCPA Tools for Ad Industry* (Nov. 25, 2019), located at https://digitaladvertisingalliance.org/press-release/digital-advertising-alliance-announces-ccpa-tools-ad-industry.
[9] Cal. Code Regs. tit 11, § 999.315(h)(3) (proposed Oct. 12, 2020).

Internet would be unduly hindered, thereby undermining a consumer's ability to make an informed decision. A business should be able to effectively communicate with consumers to inform them about how and why their data is used, and the benefit that data-driven advertising provides as a critical source of revenue.

It is no secret that consumers greatly value the information they can freely access online from digital publishers. However, local news publishers, for instance, continue to struggle to get readers to pay subscription fees for their content, even though this content is highly valuable to consumers and society. Thus, most news publishers have become increasingly reliant on tailored advertising, because it provides greater revenue than traditional advertising.[10] However, the proposed modifications, as drafted, could obstruct consumers from receiving truthful, important information by hindering a business' provision of a reasonable notice to consumers about the funding challenges opt outs pose to their business model.

The CCPA regulations should not prevent consumers from receiving and businesses from providing full, fair, and accurate information during the opt out process. The proposed modification would impede consumers from receiving important information about their privacy choices, such as information about the vital nature of the ad-supported Internet, and, as explained in Section III, they may be contemporaneously receiving partial or misleading negative information about their opt out rights.

To ensure a fully informed privacy choice, consumers must have every ability to access information about business practices and the benefits of the digital advertising ecosystem. Providing ample and timely opportunities for consumers to gain knowledge about their choice to opt out is of paramount importance to avoid confusion and ignorance; this allows a consumer to be fully informed about the actual implications of their decision. By prohibiting a business from requiring a consumer "to click through or listen to reasons why they should not submit a request to opt-out *before* confirming their request" the regulations do not safeguard against this concern. As presently written, the proposed modification appears to limit businesses' ability to provide such vital information as a consumer is opting out, even if such information is presented in a seamless way. It is unclear what amount of information, or what method in which such information is presented, could constitute a violation of the rules. Instead of setting forth prohibitive rules that could reduce the amount of information and transparency available to consumers online, the OAG should prioritize facilitating accurate and educational exchanges of information from businesses to consumers. As a result, we ask the OAG to revise the text of the proposed modification in Section 999.315(h)(3) so that businesses are permitted to describe the impacts of an opt-out choice while facilitating the consumer's request to opt out.

Additionally, the restrictions created by this proposed modification infringe on businesses' First and Fourteenth Amendment right to commercial speech. As written, Section 999.315(h)(3) restricts the information consumers can receive from businesses as they submit opt out requests by limiting the provision of accurate and truthful information to consumers. The Supreme Court has explained that "people will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ."[11] Because this proposed regulation prescriptively regulates channels of communication, it violates the First and Fourteenth Amendments.

The state may not suppress speech that is "neither misleading nor related to unlawful activity" unless it has a substantial interest in restricting this speech, the regulation directly advances that interest,

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[10] DAA, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), located at https://digitaladvertisingalliance.org/press-release/study-online-ad-value-spikes-when-data-used-boost-relevance.
[11] *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U. S. 748, 770 (1976).

and the regulation is narrowly tailored to serve that interest.[12] The proposed regulation fails each part of the test:

- ***No substantial interest:*** Although there is no stated justification in the proposal, the most likely interest would be to streamline opt out requests by making it easier and faster to submit opt-outs. The OAG presumably wants nothing to impede consumers from opting out, but it is unclear because the OAG has not affirmatively stated its purpose for the proposed modification. Consumers should be made aware of the ramifications of their opt out decisions as they are opting out – not after confirming a request – so they do not make opt out choices to their detriment because they do not know the effect of such choices. For this reason, they should be able to receive information from businesses about the consequences of their opt out choices as they are submitting opt out requests. Providing information concerning the impact of an opt out is not an impediment to the process, but rather improves it.

- ***No advancement of the interest:*** If streamlining opt out requests to remove perceived impediments is the justification for the proposed rule, then the proposal does not advance that interest. The proposed regulation already includes many other specific requirements that facilitate speed and ease of opt-outs, including a requirement to use the minimal number of steps for opt-outs (and no more than the number of steps needed to opt in), prohibiting confusing wording, restricting the information collected, and prohibiting hiding the opt-out in a longer policy, all of which directly advance this interest without suppressing speech. The proposed rule limiting businesses from clicking through or listening to reasons would not make the opt out process easier for consumers, because it could result in consumers making uninformed choices if they are not notified of the consequences of their decision to opt out as they are making it. A "regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[13] This proposed regulation is both ineffective and provides no support for the government's purpose.

- ***Not narrowly tailored:*** The proposed regulation is an overly broad and prescriptive restriction on speech that hinders accurate and educational communications to consumers about the consequences of a decision to opt-out. The regulations already include various other provisions that work to streamline the opt out process. "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[14] As noted above, there are many ways to craft regulations to require simple and fast opt-out mechanisms that do not suppress lawful and truthful speech.

In sum, the regulation violates each and every prong of the framework for evaluating commercial speech. "As in other contexts, these standards ensure not only that the state's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message."[15] The proposed regulation would do exactly that. Thus, it is a content-based restriction on speech, subject to heightened scrutiny. The U.S. Supreme Court has made clear that the burden is on the government to justify content-based restrictions on lawful speech, and the failure to even state a basis for this restriction fails to meet this requirement.[16] The OAG should revise the text of the proposed

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[12] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980); *see also Individual Reference Services Group, Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001).
[13] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).
[14] *Id.*
[15] *Sorrell v. IMS Health Inc.*, 564 U.S. 572, 565 (2011).
[16] *E.g., Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (citing *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)).

modification in Section 999.315(h)(3) to avoid running afoul of the First and Fourteenth Amendments and to ensure consumers may receive information about the impacts of an opt out request as they engage in the opt out process with a business.

III. The Proposed Modifications Should Impose the Same Notice Requirements on Authorized Agents as They Impose on Businesses

The proposed modifications to the CCPA regulations would require a business to ask an authorized agent for proof that a consumer gave the agent signed permission to submit a rights request.[17] Although this provision helps ensure businesses can take steps to verify that authorized agents are acting on the true expressed wishes of consumers, the proposed modifications do not offer consumers sufficient protections from potential deception by authorized agents. For example, while the proposed modifications would impose additional notice obligations on businesses,[18] those requirements do not extend to authorized agents. Authorized agents consequently have little to no guidelines or rules they must follow with respect to their communications with consumers, while businesses are subject to onerous, highly restrictive requirements regarding the mode and content of the information they may provide to Californians. The asymmetry between the substantial disclosure obligations for businesses and the lack thereof for authorized agents could enable some agents to give consumers misleading or incomplete information. We encourage the OAG to take steps to modify the proposed modifications to the CCPA regulations in order to equalize the notice requirements placed on businesses and agents, thus ensuring consumers can act on an informed basis under CCPA. In Section II of this submission, we discuss related First Amendment and communications fairness issues implicit in a balanced consumer privacy notice regime.

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The proposed modifications to the CCPA regulations related to offline notices present a number of problems for consumers and businesses. As written, the CCPA implementing regulations already provide sufficient guidance to businesses regarding the provision of offline notice at the point of personal information collection in brick-and-mortar stores.[19] The proposed modifications are more restrictive and prescriptive than the current plain text of the CCPA regulations, would restrict businesses' speech, would remove the flexibility businesses need to effectively communicate information to their customers, and would unnecessarily impede business-consumer interactions. We therefore ask the OAG to update the proposed modifications to: (1) remove the proposed illustrative example associated with brick-and-mortar stores, and (2) explicitly enable businesses communicating with Californians by phone to direct them to an online notice where CCPA-required disclosures are made to satisfy their offline notice obligation, a medium which is more familiar to consumers for these sorts of disclosures along with having the added benefit of being able to present additional choices to the consumer. This sort of operational flexibility is necessary for businesses to convey important notices in context.

The proposed modifications would require businesses that sell personal information to "inform consumers by an offline method of their right to opt-out and provide instructions on how to submit a request" when interacting with consumers offline.[20] The proposed modifications proceed to offer the following "illustrative examples" of ways businesses may provide such notice: through signage in an area where the personal information is collected or on the paper forms that collect personal information in a

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[17] Cal. Code Regs. tit. 11, § 999.326(a) (proposed Oct. 12, 2020).
[18] *Id.* at § 999.315(h)(3).
[19] Cal. Code Regs. tit. 11, § 999.305(a)(3)(c) (finalized Aug. 14, 2020).
[20] Cal. Code Regs. tit. 11, § 999.306(b)(3) (proposed Dec. 10, 2020).

brick-and-mortar store, and by reading the notice orally when personal information is collected over the phone.[21] While the illustrative examples set forth limited ways businesses can give notice in compliance with the CCPA, they are more restrictive than existing provisions of the CCPA regulations and detract from the flexibility businesses need to provide required notices that do not burden consumers or cause unreasonable friction or frustration during the consumer's interaction with the business.

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Additionally, the proposed modifications' illustrative example of providing notice orally to consumers on the phone appears to suggest that reading the full notice aloud is the only way businesses can provide CCPA-compliant notices via telephone conversations. Reading such notice aloud to consumers would unreasonably burden the consumer's ability to interact efficiently with a business customer service representative and would likely result in consumer annoyance and frustration. Requiring businesses to keep consumers on the phone for longer than needed to address the purpose for which the consumer contacted the business would introduce unneeded friction into business-consumer relations. Instead, businesses should be permitted to direct a consumer to an online link where information about the right to opt out is posted rather than provide an oral catalog of information associated with particular individual rights under the CCPA.

The proposed modifications' addition of illustrative examples regarding methods of offline notice is unnecessary, redundant, inflexible, and likely highly costly for many businesses. These modifications would result in consumer confusion, leave businesses wondering if they may take other approaches to offline notices, and if so, how they may provide such notice within the strictures of the CCPA. We therefore ask the OAG to remove the proposed illustrative example associated with brick-and mortar stores

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[21] *Id.*

[22] Cal. Code Regs. tit. 11, § 999.305(a)(3)(c) (finalized Aug. 14, 2020).

as well as clarify that businesses communicating with consumers via telephone may direct them to an online website containing the required opt out notice as an acceptable way of communicating the right to opt out.

* * *

Thank you for the opportunity to submit input on the content of the proposed modifications to the CCPA regulations. Please contact Mike Signorelli of Venable LLP at [redacted] with any questions you may have regarding these comments.

Sincerely,

Dan Jaffe
Group EVP, Government Relations
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Executive Vice President, Government Relations
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Lou Mastria
Executive Director
Digital Advertising Alliance

July 28, 2021

California Office of the Attorney General
Attorney General Rob Bonta
300 South Spring Street, First Floor
Los Angeles, CA 90013

RE: Response to CCPA FAQ Regarding User-Enabled Controls and Related Enforcement Letters

Dear Attorney General Bonta:

The undersigned trade associations and organizations collectively represent a broad cross-section of the Californian and United States business community spanning various industries including advertising and marketing, analytics, magazine publishing, Internet and online services, financial services, package delivery, cable and telecommunications, transportation, retail, real estate, insurance, entertainment, auto, and others. Our organizations have a long history of supporting consumers' ability to exercise choice over uses of data for digital advertising. Enabling consumers to express their preferences and exercise control through easy-to-use, user-enabled choice mechanisms is a foundational aspect of data privacy that we have championed for decades. However, we are concerned that the OAG's new FAQ response regarding user-enabled global privacy controls will cause confusion for consumers and businesses, rather than effectuating genuine user choices.

In particular, we maintain the following three concerns. First, the FAQ mandate directly conflicts with the approach taken in the California Privacy Rights Act of 2020 ("CPRA"), which becomes operative in less than 18 months. Second, there was no public process for evaluating or

considering the cited tools or the particular implementations by the browser referenced in the FAQ, and as a result there are diverging perspectives around what constitutes a tool that is "user enabled." Finally, the existence of the FAQ unnecessarily prejudices a subject matter on which the California Privacy Protection Agency ("CPPA") is directed by law to promulgate rules. These concerns are compounded by the recent publicly-reported enforcement letters sent by the OAG to companies on adherence to such signals.[1] We therefore ask you to retract this FAQ response, reconsider your enforcement approach to user-enabled global privacy controls, and defer to California's new privacy agency on the subject.

- **The FAQ response conflicts with the approach taken in the CPRA. This will lead to confusion for consumers and businesses.** Not only does the California Consumer Privacy Act of 2018 ("CCPA") not direct the Attorney General to create and mandate adherence to the controls described in Section 999.315(c) of the regulations implementing the law,[2] but the FAQ response stands in direct contrast to the approach to such controls taken in the CPRA. According to the CPRA, businesses "may elect" to either (a) "[p]rovide a clear and conspicuous link on the business's internet homepage(s) titled 'Do Not Sell or Share My Personal Information'" **or** (b) allow consumers to "opt-out of the sale or sharing of their personal information… through an opt-out preference signal sent with the consumer's consent by a platform, technology, or mechanism, based on technical specifications to be set forth in regulations[.]"[3] Despite this choice that will become available to businesses in a short time, the FAQ response and decision to send enforcement letters to businesses regarding user-enabled privacy controls that do not align with the CPRA is unnecessary and creates confusion in the market. The OAG consequently takes a position on such controls that does not reflect California law and is likely to be different from the approach spelled out by new regulations implementing the CPRA. This will result in confusion for consumers and businesses.

- **The FAQ statement directly conflicts with the CPRA mandate explicitly directing California's new privacy agency to issue specific rules governing user-enabled global privacy controls.** The CPRA tasks the CPPA to issue particularized regulations governing user-enabled global privacy controls to help ensure consumers and businesses are protected from intermediary interference. Given the lack of formal process employed with respect to the OAG's proposed application of global privacy controls and the FAQ response, it does not appear that these safeguards have been considered and addressed. For example, the CPRA instructs the CPPA to "ensure that the manufacturer of a platform or browser or device that sends the opt-out preference signal *cannot unfairly disadvantage another business*."[4] According to the CPRA, the CPPA must also ensure user-enabled global privacy controls "*clearly*

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[1] *See State of California Department of Justice, Rob Bonta Attorney General,* California Consumer Privacy Act (CCPA) FAQ Section B, #7 and #8, available at https://oag.ca.gov/privacy/ccpa; *see also* Kate Kaye, *California's attorney general backs call for Global Privacy Control adoption with fresh enforcement letters to companies*, DIGIDAY (Jul. 16, 2021), available at https://digiday.com/marketing/californias-attorney-general-backs-call-for-global-privacy-control-adoption-with-fresh-enforcement-letters-to-companies/.

[2] Cal. Code Regs. tit. 11, § 999.315(c); *see also* Joint Ad Trades Comments on the Second Set of Proposed Regulations Implementing the CCPA at CCPA_2ND15DAY_00310 - 00313, available here (noting California Administrative Procedural Act and constitutional concerns with Section 999.315(c) of the regulations implementing the CCPA) .

[3] CPRA, Cal. Civ. Code § 1798.135(b)(3).

[4] CPRA, Cal. Civ. Code § 1798.185(a)(19)(A) (emphasis added).

represent a consumer's intent and [are] free of defaults constraining or presupposing such intent."[5]

In contrast, the OAG's FAQ response does not ensure that any of the safeguards set forth in the CPRA's regulatory instructions are followed. For instance, the OAG's FAQ response lists a browser that sends opt-out signals by default without consulting the consumer, and such signals are unconfigurable.[6] The OAG's FAQ response therefore does not provide any means to enable businesses to determine whether a global privacy control signal, as implemented by particular browsers, is truly user-enabled, or if it is instead sent or communicated by an intermediary in the ecosystem without the consumer's consent. Moreover, the FAQ response contravenes the will of Californians, as expressed in passing the CPRA ballot initiative, that privacy regulation on the subject of user-enabled global privacy controls should come from the CPPA as opposed to the OAG.

- **New OAG guidance regarding user-enabled global privacy controls should be developed through a deliberative process that considers stakeholder input.** The OAG's FAQ response was posted to its website without any sort of formal deliberation or process prior to publication. Legal and material guidance such as those contained in the FAQ should only be issued after a carefully deliberated formal process that allows for public input. New rules or guidance regarding user-enabled global privacy controls should be afforded the benefit of a formal process, including public comment and thoughtful evaluation.

  Such process should also indicate how the OAG and/or CPPA will (i) ensure such controls are compliant with the CPRA, (ii) monitor control providers to ensure their compliance with law and the standards set forth in the CPRA, and (iii) set forth a system to ensure that modifications by browsers and other intermediaries remain compliant with law to avoid circumstances where changes "unfairly disadvantage another business" or no longer "clearly represent a consumer's intent and [are] free of defaults constraining or presupposing such intent." Issuing a rule on such controls without providing a deliberative process risks creating significant confusion and unworkable policy for consumers and businesses alike.

* * *

The undersigned trade associations and organizations fully support empowering consumer choice and advancing workable privacy protections for Californians. However, the position reflected in the OAG's recent FAQ response and enforcement letters was issued without formal process and contradicts the approach to user-enabled global privacy controls taken in the CPRA. We therefore respectfully ask you to reconsider the FAQ response, as well as your enforcement

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[5] *Id.*

[6] *See* Brave, *Global Privacy Control, a new Privacy Standard Proposal, now Available in Brave's Desktop and Android Testing Versions*, available at https://brave.com/global-privacy-control/ ("Importantly, Brave does not require users to change anything to start using the GPC to assert your privacy rights. For versions of Brave that have GPC implemented, the feature is on by default and unconfigurable.")

approach concerning user-enabled global privacy controls, and to instead defer to the CPPA on the issue. Please contact Mike Signorelli of Venable LLP at [redacted] with questions on this letter.

Sincerely,

Dan Jaffe
Group EVP, Government Relations
Association of National Advertisers
[redacted]

Alison Pepper
Executive Vice President, Government Relations
American Association of Advertising Agencies, 4A's
[redacted]

Christopher Oswald
SVP, Government Relations
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David Grimaldi
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David LeDuc
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Network Advertising Initiative
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Clark Rector
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Cameron Demetre
Executive Director, CA & the Southwest
TechNet
[redacted]

Anton van Seventer
State Privacy & Security Coalition
[redacted]

CC: California Privacy Protection Agency

EXHIBIT B

PRINCIPLES FOR USER-ENABLED CHOICE SETTING MECHANISM

A Choice Setting should meet the following criteria:

1. **Accessing the Setting.** A Choice Setting shall be activated in the settings panel of a browser and/or device, which is accessible from a menu. Additional prompts or other means of accessing a Choice Setting may be offered in addition to the setting panel, but such additional prompts or means should not unfairly disadvantage an entity.

2. **Describe Setting & Effect.** A Choice Setting shall communicate the following:

    a. **Effect of Choice.** The effect of exercising such choice including that a Choice Setting signal is limited to communicating a preference to opt out from the sale of personal information, specific types of advertising, and/or any other legal right provided by law; and the fact that some data may still be collected and used for purposes not subject to the rights provided by law following the sending of a choice signal;

    b. **Scope of Opt Out.** Choice made via the Choice Setting applies to the browser or device from which such choice is made, or for the consumer, if known to the entity receiving the signal and required by law; and

    c. **Affirmative Direction to Sell.** The fact that if a consumer affirmatively allows a particular entity to collect, sell, or use personal information about interactions, viewing and/or activity from Web sites, devices, and/or applications, the activation of the Choice Setting will not limit that collection, sale, or use from such entity.

3. **Affirmative Step.** The consumer shall affirmatively consent to turn on or activate the Choice Setting via the settings panel of a browser and/or device. Such ChoiceSetting may not be preselected, turned on, or activated by default.

4. **Option to Withdraw Choice.** A Choice Setting shall provide a means for a consumer to turn off, deactivate, or revoke consent for the Choice Setting through the same means the consumer previously made the affirmative choice to turn on or activate the Choice Setting.

5. **Jurisdictional Signal.** The Choice Setting should indicate the jurisdiction(s) from which choice is made in a manner that the entity receiving the signal may determine the applicable legal requirement(s).

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