Consumer Data Industry Association
1090 Vermont Ave., NW, Suite 200
Washington, D.C. 20005-4905

P 202 371 0910

Writer's direct dial: +1 (202) 408-7407

CDIAONLINE.ORG

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*Via Electronic Delivery to privacyregulations@doj.ca.gov*

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

**RE: Third Set of Modifications to California Consumer Protection Act Regulations**

Dear Ms. Kim,

The Consumer Data Industry Association submits this comment letter in response to the California Office of the Attorney General's Third Set of Proposed Modifications to the California Consumer Privacy Act ("CCPA") Regulations.

The Consumer Data Industry Association ("CDIA") is the voice of the consumer reporting industry, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others.

CDIA is the voice of the consumer reporting industry, representing consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs.

CDIA members have been complying with laws and regulations governing the consumer reporting industry for decades. Members have complied with the Fair Credit Reporting Act ("FCRA"), which has been called the original federal consumer privacy law. The FCRA governs the collection, assembly, and use of consumer report information and provides the framework for the U.S. credit reporting system. In particular, the FCRA outlines many consumer rights with respect to the use and accuracy of the information contained in consumer reports. Under the FCRA, consumer reports may be accessed only for permissible purposes, and a consumer has the right to dispute the accuracy of any information included in his or her consumer report with a consumer reporting agency ("CRA").

CDIA members have been at the forefront of consumer privacy protection. Fair, accurate, and permissioned use of consumer information is necessary for any CDIA member client to do business effectively.

CDIA appreciates the thorough work of the Department of Justice ("Department" or "DOJ") in finalizing the CCPA regulations. However, CDIA has serious concerns regarding the second grouping of proposed changes in this third set of modifications, specifically the changes to section 999.315(h) relating to opt-out requests. As we describe in greater detail below, the "illustrative examples" actually impose restrictions that do not implement any particular provision in the CCPA or the implementing regulations and exceed the law's authorization for the Department to adopt regulations "*necessary* to further the purposes of" the law. *See* Cal. Civ. Code § 1798.185(b)(2) (emphasis added).

Additionally, imposing new requirements and restrictions with little notice makes compliance with those requirements very difficult from an operational standpoint. CDIA therefore respectfully requests at least 6 months of delayed enforcement on any changes the DOJ adopts.

To assist your office in promulgating clear and effective regulations that allow businesses to best support customers and consumers, CDIA offers the following comments on proposed section 999.315(h).

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In this third set of proposed modifications to the CCPA regulations, the Department proposes to require that the methods for opting out must be "easy for consumers to execute and . . . require minimal steps to allow the consumer to opt-out." The proposal also would prohibit use of a method designed with the purpose or that has the substantial effect of subverting or impairing a consumer's choice to opt out.

The proposal then sets out what it refers to as "illustrative examples" of these two principles. However, the "illustrative examples" do not read as examples of methods that would or would not be easy to execute and require minimal steps to effective. Instead, the "examples" read as new requirements and restrictions not contemplated by the statute, that are not "necessary to further the purposes of the statute," and that are otherwise problematic to the goals of the CCPA.

1. **The proposed restriction that the number steps to opt out may not exceed the number of steps to opt in.**

First, the proposal includes an illustrative example providing that a business's opt out method may not require more steps than the business's opt in process. The example also provides specifics as to how to count the steps to compare the two processes.

ISSUES: This proposal is not just an illustrative example but a strict limitation on how a business may set up its opt out and opt in processes, demonstrated by the strict guidance on how to "count" how many steps a process has. This is a specific restriction on the form businesses may use to receive verifiable consumer requests not contemplated in the statute or current regulations.

Additionally, this restriction conflicts with existing regulation section 999.315(b), which provides that businesses must consider the methods by which they interact with consumers *along with* ease of use for the consumer. Businesses that deal in sensitive consumer information, like CDIA members, have established systems by which they interact with consumers, and a requirement to minimize the number of steps in submitting a request conflicts with the requirement to consider both ease of use *and* the normal methods of interaction.

PROPOSED SOLUTION: Replace the limitation on the number of steps a business may use in its opt out process with an instruction that for purposes of section 999.315(b), "ease of use by the consumer" includes considering the number of steps an opt out process takes.

2. **The restriction that the opt-out method may not use double negatives or other "confusing language."**

The second proposed illustrative example provides that a business may not use "confusing language, such as double-negatives" in the opt out process.

ISSUES: Banning "confusing language" is an overbroad prohibition lacking authorization in the statute.

Additionally, other than noting that double negatives are confusing, this illustrative example provides no guidance as to what is or could be "confusing" to consumers. Prohibiting an undefined category of language thus raises due process concerns. Similarly, prohibiting an undefined category of speech also raises serious First Amendment concerns.

PROPOSED SOLUTION: Strike this section.

3. **The restriction that a business may not require consumers to click through or listen to reasons not to opt out.**

The third illustrative example prohibits business from requiring consumers to click through or listen to reasons not to opt out.

ISSUES: This is a prohibition on content a business may include in its opt out flow, not an illustrative example of "ease of use." The CCPA opt out right only applies to certain data, for example, and a business should be able to educate a consumer about what effect an opt out does, and does not, have. Additionally, consumers might not understand the nature of the right, such as confusing the CCPA "opt out" with the FCRA's prescreen opt out, which applies to data to which the CCPA opt out does not apply. If a consumer was seeking to exercise their federal right to opt out of prescreened solicitations, for example, CDIA members should be permitted to explain to a consumer that exercising their CCPA opt out right would not have the same effect. Without specific definitions or limitations, this prohibition could discourage businesses from including helpful, explanatory language that could help consumers navigate their choices under the CCPA.

Furthermore, as a content restriction without any guidance on what it means by "reasons not to opt out," this prohibition also raises serious due process and First Amendment concerns.

PROPOSED SOLUTION: Strike this section.

4. **The restriction that the business may not require a consumer to provide personal information not necessary to implement the request.**

The fourth illustrative example provides that a business may not require in its opt out process that the consumer provide personal information "not necessary to implement the request."

ISSUES: The CCPA does not restrict what information a business can request in order to effectuate a consumer's opt out, so this restriction exceeds the scope of the statute. The CCPA already prohibits, at Cal. Civ. Code § 1798.130(a)(7), a business from using personal information obtained for verification of a request for any purpose other than verification.

Additionally, CDIA has due process concerns with this restriction, as there is no guidance on how a business is expected to assess whether a particular data point is or is not necessary to implement a request on an individual, let alone a global, scale.

Finally, businesses have to endeavor to match opt out requests to data on a particular consumer, and imposing a restriction on required data points complicates that mandate because matching is not always a straightforward task, given the variety of data that companies may collect and the variety of fields that data may contain. A business may be able

to improve its ability to match if it requests more data points. Without guidance as to what information the AG considers to be "not necessary" for this process, however, there is no way for a company to assess whether they comply with this standard.

PROPOSED SOLUTION: Strike this section.

5. **The restriction that the business may not require a consumer to search or scroll through the text of a "privacy policy or similar document or webpage" to locate the opt-out mechanism.**

The fifth illustrative example provides that a business may not require a consumer to search or scroll through the text of "a privacy policy or similar document or webpage" to exercise an opt out.

ISSUES: This proposal is confusing, as it is not clear what counts as "a privacy policy or similar document or website." The CCPA statute and current regulations already provides guidance on the placement of the Do Not Sell My Personal Information link.

Furthermore, prohibiting the inclusion of information alongside the opt out mechanism raises serious due process and First Amendment concerns. Without clarity as to what the AG finds objectionable, businesses are not equipped to comply with this restriction.

PROPOSED SOLUTION: Strike this section.

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Thank you for the opportunity to share its views on the proposed regulations. Please contact us if you have any questions or need further information based on comments.

Sincerely,

Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs