February 25, 2020

Via Email

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

RE: Written Comments on the Modified Draft CCPA Regulations

To Whom It May Concern:

The Entertainment Software Association ("ESA")[1] submits these comments in response to the Attorney General's Updated Notice of Modifications to Text of Proposed Regulations implementing the California Consumer Privacy Act ("CCPA").[2] These modifications take several important steps in the right direction to ensure the privacy and security of Californians' is protected, consistent with the statute. ESA and its members respectfully request that the Attorney General further clarify the four points described below to avoid confusion about how the Attorney General's office plans to interpret and enforce the statutory requirements.[3]

[1] ESA is the U.S. association for companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the internet. There are over 900 video game companies in the State of California.

[2] California Department of Justice, Updated Notice of Modifications to Text of Proposed Regulations And Addition Of Documents And Information To Rulemaking File (Feb. 10, 2020), https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-notice-of-mod-020720.pdf?.

[3] In addition, ESA reiterates its request that the Attorney General strike the requirement in Section 999.317(g) to publish certain metrics regarding responses to consumer requests. While raising the threshold for this requirement from four to ten million consumers diminishes the impact of this provision, this revision does not address the underlying concerns raised by ESA and a number of other commenters, that (for example) compiling the required metrics may not be practically feasible and that publication could unintentionally mislead consumers about a company's compliance. *See, e.g.* Comments of ESA at 6-8; Comments of California Chamber of Commerce at 21; Comments of California Retailers' Association at 17; Comments of CCIA at 9-10; Comments of News Media Alliance at 8; Comments of American Bankers Association at 7; Comments of U.S. Chamber of Commerce at 7-8.

1. Reaffirm that businesses may refuse consumer requests that create a risk to security or the integrity of a business's systems.

The modified draft regulations strike the language in Section 999.313(c)(3) explaining that "[a] business shall not provide a consumer with specific pieces of personal information if the disclosure creates a substantial, articulable, and unreasonable risk to the security of that personal information, the consumer's account with the business, or the security of the business's systems or networks."

Clearly, the deletion of this language could not have intended to require a company to provide access to an individual reasonably believed to be unauthorized or a malicious actor trying to compromise the integrity or security of the business's systems or networks. Such an interpretation would not only undermine the purposes of the statute, but also would force businesses to act in a manner inconsistent with other legal obligations, such as California's requirement to "maintain reasonable security procedures and practices" to protect the security of personal information.[4]

Consequently, ESA and its members understand that this language was deleted because it is not necessary. For example, it would be redundant with the statute's requirement that consumer requests be "verifiable" and with existing exemptions permitting a business to deny a consumer request if it would impede a business's ability to comply with law, exercise or defend legal claims, or avoid adversely affecting the rights and freedoms of other consumers.[5] Clarifying this point in the Final Statement of Reasons, however, would avoid any doubt regarding the Attorney General Office's intentions in deleting the draft language.

2. Further clarify the CCPA's "sale" definition.

ESA appreciates the clarifications in the modified draft regulations that (1) the only user-enabled privacy controls covered under the statute are those that communicate or signal a consumer's choice to opt out of the ***sale*** of personal information and that (2) sale opt-outs must require the consumer to affirmatively select their choice.[6] This language not only reaffirms ESA's understanding that the Attorney General never intended to force businesses to honor do-not-track signals as opt-out-of-sale requests,[7] but also clarifies that businesses need not honor third-party settings that opt consumers out of data sales by default. By emphasizing that businesses must honor the consumer's expressed preference and because a consumer might make a different choice (or no choice at all) on other browsers or devices, this language also helps clarify that, to the extent controls for sales of personal information are specific to a particular browser or device, such controls should apply only to that particular browser or device.

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[4] *See* Cal. Civ. Code § 1798.81.5(b).

[5] *See, e.g., id.* §§ 1798.110(b), 1798.115(b), 1798.145(a)(1), (4), 1798.145(l).

[6] Modified Proposed Text of Regulations, § 999.315(d)(1).

[7] *See* Comments of ESA at 11 n.32.

However, notwithstanding multiple requests from commenters for further guidance on the scope of the "sale" definition, the modified draft regulations do not explicitly address this issue.[8] As ESA explained in its prior comments, the statutory text and legislative history are clear that a disclosure is not a "sale" if the exchange of personal information is not "for monetary or other valuable consideration."[9] Consequently, disclosures of personal information to third parties who receive personal information in order to (for example) provide or facilitate video game services to players should be treated as a disclosure of personal information for a business purpose, and not a "sale" of such information. If the Attorney General does not address this issue in the final regulations, ESA requests that it be clarified in the Final Statement of Reasons.

In addition, the modified draft regulations make permissive the double opt-in for consumers to submit a deletion request, but retains a two-step process when a consumer opts in to data sales (either because the consumer reverses their decision to opt out or is at least 13 and less than 16 years of age).[10] ESA requests that the Attorney General harmonize these provisions so that a double opt-in, which is not contemplated anywhere in the statutory text, is permissive in all circumstances, and is not legally required.

3. Further conform the children's privacy language with the helpful COPPA clarifications included in the modified draft regulations.

Commenters overwhelmingly supported bringing the initial draft regulations into alignment with the Children's Online Privacy Protection Act ("COPPA"), and ESA appreciates the revisions in the modified draft regulations come closer to this goal.[11] However, some legacy language remains in the regulations that inadvertently could be interpreted to require multiple parental consents. Specifically, the modified draft regulations suggest that the affirmative authorization required under the CCPA is "in addition to" verifiable parental consent obtained under COPPA. As a result, there could be some confusion over whether two methods of parental consent are required—one for CCPA and a second one for COPPA. Such a result clearly would be duplicative and unduly burdensome for parents. Consequently, ESA respectfully requests that the Attorney General make one additional conforming edit to Section 999.330(a)(1):

> A business that has actual knowledge that it sells the personal information of children under the age of 13 shall establish, document, and comply with a reasonable method for determining that the person affirmatively authorizing the sale of the personal information about the child is the parent or guardian of that child. This affirmative authorization ~~**is in addition to**~~ *may include* any verifiable parental consent required under COPPA.

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[8] *See, e.g.*, Comments of Computer and Communications Industry Association (CCIA) at 2; Comments of ESA at 10-11; Comments of IG US Holdings, Inc. at 6-7; Comments of the Association of Test Publishers at 7; Comments of Consumer Bankers Association at 4-5; Comments of SchoolsFirst Federal Credit Union at 1.

[9] Comments of ESA at 10-11.

[10] *Compare* Modified Proposed Text of Regulations, § 999.312(d), *with id.* §§ 999.316(a) and 999.301(a).

[11] *See, e.g.* Comments of CCIA at 10; Comments of Consumer Technology Association at 13; Comments of CTIA at 22-24.

4. Further clarify that the service provider provision is consistent with the statutory text.

Multiple commenters, including ESA, noted that the initial draft regulations governing service providers were inconsistent with the statutory text and needed to be revised to permit the processing of personal information for the service provider's "business purposes," as that term is defined under the statute.[12]

The modified draft regulations expand the circumstances in which a service provider may process personal information.[13] And a reasonable interpretation of the modified draft regulations is that processing of the personal information as permitted in the written contract is a "notified purpose" permitted under the statute's "business purpose" definition.[14] For example, if the services specified in the written contract with the business include allowing the service provider to segment households or consumers into audiences for advertising or marketing, then this would be permissible under Section 999.314(c)(1) of the modified draft regulations.

This interpretation is consistent with the statute's "business purpose" definition, which explicitly authorizes "the use of personal information for . . . a service provider's operational purposes, or other notified purposes, provided that the use of personal information shall be reasonably necessary and proportionate to achieve the operational purpose for which the personal information was collected or processed or for another operational purpose that is compatible with the context in which the personal information was collected" and includes "providing advertising or marketing services, providing analytic services, or providing similar services on behalf of the business or service provider."[15] ESA encourages the Attorney General to explicitly adopt this interpretation in the Final Statement of Reasons.

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ESA appreciates the significant efforts of the Attorney General's Office in this rulemaking and welcomes the opportunity to continue working with the Attorney General and his staff on these important issues.

[12] *See, e.g.*, Comments of California Cable and Telecommunications Association at 8-11; Comments of California Chamber of Commerce at 11-12; Comments of CCIA at 7; Comments of Consumer Data Industry Association at 13; Comments of Consumer Technology Association at 9-11; Comments of CTIA at 14-16; Comments of Engine Advocacy at 5-6; Comments of NAI at 24-25.

[13] Modified Proposed Text of Regulations, § 999.314(c).

[14] § 1798.140(d).

[15] *Id.*

Sincerely,

Gina Vetere
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Entertainment Software Association