NEWS MEDIA ALLIANCE

March 8, 2019

The Honorable Xavier Becerra
Attorney General, State of California
California Department of Justice
ATTN: Privacy Regulations Coordinator
300 S. Spring Street
Los Angeles, CA 90013

Dear Attorney General Becerra:

A thriving free and independent press is an essential part of any healthy democracy. Only the media can cast light on the inner workings of power and equip the citizenry to exert democratic control at all levels from local to federal. A well-designed comprehensive privacy law should protect individual privacy rights without stifling the free flow of information and news organizations' ability to deliver essential information to the people of the State of California.

The News Media Alliance ("Alliance") is the voice of the news media industry. Its membership represents over two thousand (2,000) diverse news organizations in the United States—from the largest news groups and international outlets to hyperlocal news sources, from digital to print news. The Alliance respectfully submits the following comments and urges the Attorney General to carefully consider the significant negative consequences the California Consumer Privacy Act ("CCPA") will have on the freedom of the press and consumers in the absence of critical clarifications that can be included as part of this rulemaking and in related industry guidance.

I. The Rules Must Clarify the Scope of the Protections for Journalism Set Forth in the Act.

The role of journalism in our country serves the core mission of informing the public, which is critical to a healthy democracy and a civic society. Today, maybe more than ever, readers of local and national news depend on reporters who spend countless hours uncovering facts and acting as the watchdogs of those in power. Newsrooms commit tremendous capital and resources to those efforts, prioritizing the output of quality journalism over short-term gain.

In the digital advertising ecosystem, in which news publishers participate in order to help sustain the business of news, there are systematic flaws that have been recognized by lawmakers related

to data collection and unexpected uses of that data. The news media industry commends the intent of the statute and offers its support in shaping implementation to reflect the primary goals of the CCPA.

Legislators properly recognized noncommercial newsgathering activities that were protected through a September 2018 amendment to the CCPA as a step in the right direction. News publishers further request recognition of commercial activities that are necessary to sustain journalism, conditioned upon a limitation of the secondary uses of that data. This would maintain the integrity of the CCPA's intention to target certain unexpected uses of personal data while still protecting journalism.

Such a distinction would also avoid the unintended consequences that occurred with General Data Protection Regulation ("GDPR") in which advertising technology providers asserted themselves as independent controllers of the consumers' data, pushed their transparency obligations off to the publishers, and left it a mystery as to how they might be using the consumers' data in other unidentified ways. In this perverse twist of the law, advertising technology providers managed to continue the secondary uses and at the same time interfere with the trusted reader-publisher relationship. This behavior can and should be prevented in the CCPA.

A. The California Legislature Properly Recognized the Importance of Noncommercial Newsgathering Activities in Furtherance of Quality Journalism.

The First Amendment to the U.S. Constitution and the California Constitution[1] protect a free and independent press. The text of the CCPA explicitly recognizes these constitutional protections by excluding newsgathering from the definition of "commercial purposes" [2] and by exempting newsgathering activities from the CCPA's requirements:

> The rights afforded to consumers and the obligations imposed on any business under [the CCPA] shall not apply to the extent that they infringe on the noncommercial activities of a person or entity described in subdivision (b) of Section 2 of Article I of the California Constitution.[3]

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[1] California Constitution Art. I, §2.

[2] "'Commercial purposes' do not include for the purpose of engaging in speech that state or federal courts have recognized as noncommercial speech, including political speech and journalism." CIV. CODE §1798.140(f).

[3] CIV. CODE §1798.145(k). Section 2(b) of Article I of the California Constitution states as follows: "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished

Because of this language and clear intent of the legislature to exempt journalism from the Act's requirements, it is our understanding that the definition of "sale" was intended to exclude these constitutionally protected noncommercial activities.[4] However, this is not evident based on the current broad definition of sale, and as a result we suggest the clarifications discussed in more detail directly below.

B. The CCPA Should Also Support Commercial Activities that Support Quality Journalism and Prevent Unintended Secondary Uses.

The Attorney General has the authority to adopt regulations under Civil Code section 1798.185(a)(3) "[e]stablishing any exceptions necessary to comply with state or federal law…". The freedom of the press is protected under federal and state law and should not be crippled by the inability of news media organizations to share information that comes from/is directly related to a consumer's interaction with the publisher with those critical to the creation and distribution of information to the people.

Ever since Benjamin Day started publishing the first popularly affordable newspaper when he founded the ad-supported New York Sun in 1833, advertising has been a vital component of the press's business model, essentially subsidizing access to journalism. Advertising is the backbone of the free Internet, but it also is the reason news organizations can survive in the digital era. In the United States, circulation has plummeted over the past 24 years from a high of nearly 60 million in 1994 for print subscription to 35 million for combined print and digital distribution today.[5] Between 1994 and 2014, newsroom employment declined by 40%.[6]

If and when readers exercise their "Do Not Sell" rights, first-party news publishers should still be able to use advertising technology service providers to support journalism — however, those service providers should not be allowed to make any manner of secondary use of the personal information outside of well-defined essential purposes such as security and debugging.

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information obtained or prepared in gathering, receiving or processing of information for communication to the public. ¶Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public."

[4] CIV. CODE §1798.140(t)(1) ("Sale" means selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communication orally, in writing, or by electronic or other means, a consumer's personal information by the business to another business or to a third party for monetary or other valuable consideration.)

[5] Douglas McLennan and Jack Miles, *A Once Unimaginable Scenario: No More Newspapers*, THE WASHINGTON POST (March 21, 2018), https://www.washingtonpost.com/news/theworldpost/wp/2018/03/21/newspapers/?utm_term=.d7650756a7e0.

[6] *Id.*

The Attorney General should adopt rules to align the journalism noncommercial exception with the provisions governing "sales" of information in the interest of supporting low cost and widely available journalism. The Alliance supports providing consumers with greater control, choice, and transparency concerning their personal information. However, without appropriate rules and guidance, the CCPA is likely to cripple the business model of many news organizations, which are largely supported by advertising revenue, and risks depriving many consumers of access to such news and information. In 2017, 31% of newspapers revenue came from digital advertising.[7]

The Attorney General should also clarify in its rulemaking that any sharing of personal information by a news organization with another business – required to be a "service provider" - to support reduced cost and widely available journalism online, even if done in exchange for money or other value, is not a sale – or, at a bare minimum, subject to the exclusion for journalism built into the definition of "commercial purposes."

These clarifications would provide numerous benefits to consumers and the free press. Preventing third parties from using personal information for unexpected secondary purposes would match consumers' expectations since their information would remain entirely under the control of the party with which they are deliberately interacting, the news organization.

In order to avoid the unintended consequences that occurred with GDPR, such an interpretation would reinforce the consumer-trusted first party relationship and avoid others asserting that same relationship – which, based on experience, we know they will do. For example, just before implementation of GDPR, on March 22, 2018, Google notified news publishers that it would assert itself as an independent controller with respect to the personal data of the news publishers' end users and would unilaterally make decisions regarding how that personal data, collected by news publishers, would be used in providing advertising services. Google nonetheless expected its publisher customers to obtain legally valid consent on behalf of the publisher itself *and* Google.

II. The Attorney General Should Issue Regulations Supporting Financial Incentives Related to Personal Information and Confirming that Discounts and/or Service Enhancements Will Not Be Prohibited as Discriminatory.

Section 1798.125 is internally inconsistent. On the one hand, subsection (a) prohibits a business from discriminating against a consumer because the consumer exercised any of its rights, including by denying goods or services to the consumer, charging different prices or rates for goods or services, including through the use of discounts or other benefits, providing a different

[7] Pew Research Center on Journalism and Media available at http://www.journalism.org/fact-sheet/newspapers/.

level or quality of goods or services to the consumer, or "suggesting" that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services.

On the other hand, subsection (a)(2) states that nothing in the law shall prohibit a business from charging a consumer a different price or rate, or from providing a different level of quality of goods or services to the consumer, if that difference is "reasonably related to the value provided to the consumer by the consumer's data."[8] Subsection (b) also gives businesses the right to offer financial incentives, including payments to consumers as compensation, for the collection, sale, or deletion of their personal information.[9]

The Attorney General should issue regulations reconciling the ability to tie different prices or rates that are "reasonably related to the value provided by" the information under 1798.125(a)(2), and the ability to offer incentives for the sale of personal information under 1798.125(b)(1). News organizations should be allowed to charge more for providing access to sites and applications to consumers who opt-out and effectively demand ad-free products. If news organizations are forced to discontinue incentive programs, the low-income populations will be denied access to news as only the premium services unsupported by advertisements will be available.

The legislature has already recognized that freedom of the press requires significant exemptions from the requirements of the CCPA in order to avoid the erosion of an independent and diverse media. The Attorney General should take simple steps, outlined above, to ensure the legislation is implemented and enforced consistent with those intended protections of the press.

III. Additional Concerns That Are Not Specific to the News Industry Include a Potentially Expanded Private Right of Action and Adjustments Needed to Various Definitions.

A. The Attorney General is Best Equipped to Enforce the Privacy Provisions of the Act and Should Not Relinquish Its Role to Self-Interested Private Attorneys.

The Alliance strongly encourages the Attorney General, in its role as the top privacy enforcer in the State of California, to advocate for the strengthening of that critical role through the

[8] It seems highly likely that this includes a typo, somehow not addressed in the September 2018 technical amendments, and should read "reasonably related to the value provided to the **business** by the consumer's data."
[9] Repeating the apparent typo mentioned supra. note 8, subsection (b) states that financial incentives may also include offering a different price, rate, level, or quality of goods or services, if the difference is related to the "value provided to the consumer by the consumer's data." No one appears to understand or know what is meant by "value provided to the consumer by the consumer's data."

elimination of the ability of plaintiffs' lawyers, who do not have the expertise or breadth and depth of experience that the Attorney General, to dictate public policy through the filing of private actions.

As noted by Professor Danielle Citron[10] in her groundbreaking paper on the privacy policymaking of state attorneys general:

> State attorneys general have been nimble privacy enforcement pioneers . . . Career staff have developed specialties and expertise growing out of a familiarity with local conditions and constituent concerns. Because attorneys general are on the front lines, they are often the first to learn about and respond to privacy and security violations. … Given the important role that attorneys general have played in addressing privacy and data security issues, their enforcement power should not be curtailed or eliminated without careful consideration.[11]

Moreover, the CCPA was designed to enhance the Attorney General's powers beyond those available today. Under the CCPA, the Attorney General has the ability to seek fines and penalties ranging from $2,500 to $7,500, *all of which* financial penalties (including the proceeds of any settlement) must be deposited directly in the Consumer Privacy Fund, to *fully offset* any costs incurred by the state courts and the Attorney General in connection with the CCPA.[12] Even a single action by the Attorney General against an organization intentionally violating the Act with respect to the personal information of only one million consumers (a small number when it comes to data brokers) could net a settlement of hundreds of millions of dollars for the People of California. By contrast, a class action lawsuit in the same situation would likely result in substantial payments to *the lawyers*, small payments to individual claimants, and *nothing* to the State.

It is critical that the Attorney General use its own authority to pursue and collect these funds from bad actors and not allow plaintiffs' class action lawyers with no privacy experience to appropriate the role of "privacy cop" in order to line their own pockets with funds that should be used to protect the fundamental constitutional privacy rights of the People of the State of California.

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[10] Morton & Sophia Macht Professor of Law, University of Maryland Carey School of Law; Affiliate Scholar, Stanford Center on Internet & Society; Affiliate Fellow, Yale Information Society Project; Senior Fellow, Future of Privacy Forum.

[11] Danielle K. Citron, The Privacy Policymaking of State Attorneys General, 92 Notre Dame L. Rev. 747, 750, 800 (2017), available at: https://scholarship.law.nd.edu/ndlr/vol92/iss2/5.

[12] CIV. CODE §1798.155(c).

B. The Regulations Should Clarify the Application of Ambiguous Definitions.

There are a number of definitions in the Act that, without clarification through this rulemaking, will result in detriment to news organizations and, consequently, consumers.

i. Definition of Personal Information

Current Definition of Personal Information**:** (1) "Personal information" is defined to mean information that identifies, relates to, describes, ***is capable of being associated with***, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes but is not limited to, the following if it identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household …"

While the definition does not include publicly available information, "publicly available" is itself defined to mean only information that is lawfully made available from federal, state, or local government records, if any conditions associated with such information [sic]." The definition of "publicly available" also does not apply to data that is "used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained."[13]

The Attorney General has authority to adopt regulations to that would "[u]pdat[e] as needed additional categories of personal information to those enumerated in subdivision (c) of Section 1798.130 and subdivision (o) of Section 1798.140 in order to address changes in technology, data collection practices, obstacles to implementation, privacy concerns."[14]

The Attorney General can and should use this opportunity to put in place regulations that recognize how technology actually works in 2019. While the language "capable of being associated with" could mean that *everything* is personal information,[15] the Attorney General should issue regulations that reflect reality and narrow the scope of "personal information" from

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[13] CIV. CODE §1798.140(o).
[14] CIV. CODE § 1798.185(a).
[15] Researchers have demonstrated for years the ability to easily reidentify individuals based on allegedly "anonymized" information sets. Natasha Singer, "With a Few Bits of Data, Researchers Identify 'Anonymous' People," New York Times, January 29, 2015, available at https://bits.blogs.nytimes.com/2015/01/29/with-a-few-bits-of-data-researchers-identify-anonymous-people/ ("Even when real names and other personal information are stripped from big data sets, it is often possible to use just a few pieces of the information to identify a specific person, according to a study ['Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata'] . . . in the journal Science"). Even amateurs have successfully undertaken experiments to do the same at little expense. *Id.* (In the fall of 2014, "a reporter at Gawker was able to reidentify Kourtney Kardashian, Ashlee Simpson and other celebrities in an 'anonymized' database of taxi ride records made public by New York City's Taxi and Limousine Commission").

what could *theoretically* be associated with a consumer to that which is *reasonably likely* to be so associated *without disproportionate time and effort*. Without such common sense narrowing, businesses will have no basis upon which to identify and classify information that must truly be protected consistent with the new law and with respect to which consumers must be afforded rights.

The Attorney General should also use this opportunity to align the carve-out for "publicly available information" with constitutional parameters. Publicly available information should include information that *is, in fact, publicly available,* in posted stories and articles, and not just that information "lawfully made available from federal, state, or local government records."

ii. Definition of Business

Current Definition of Business**:** "Business" means (1) A sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumers' personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' personal information, that does business in the State of California, and that satisfies one or more of the following thresholds: (A) Has annual gross revenues in excess of twenty-five million dollars ($25,000,000), as adjusted pursuant to paragraph (5) of subdivision (a) of Section 1798.185. (B) Alone or in combination, annually buys, receives for the business's commercial purposes, sells or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices. (C) Derives 50 percent or more of its annual revenues from selling consumers' personal information.[16]

There is no definition of what is meant by "doing business" in the State of California. Without guidance, regional news organizations that transact business with vendors in California, that have in excess of $25,000,000 in revenue, and that collect only nominal amounts of personal information of California consumers (since that definition in its current form includes vendor representatives), would be swept into the scope of the CCPA and therefore deterred from transacting *any* business in California. The Attorney General should provide guidance as to what "doing business" means in relation to the CCPA and clarify that "annual gross revenue" refers to revenue received from California consumers, not worldwide revenue.

[16] CIV. CODE §1798.140(c).

iii. Definition of Homepage

Current Definition of Homepage**:** "Homepage" is defined to mean the introductory page of an Internet Web site and any Internet Web page where personal information is collected. In the case of an online service, such as a mobile application, homepage is defined to mean the application's platform page or download page, a link within the application, such as from the application configuration, "About," "Information," or settings page, and any other location that allows consumers to review the notice required by subdivision (a) Section 1798.145, including, but not limited to, before downloading the application.[17]

The Attorney General should issue rules to clarify that the definition of homepage will not be interpreted to mean every page of a website or application.

iv. Definition of Consumer

Current Definition of Consumer: "Consumer" means a natural person who is a California resident, as defined in Section 17014 of Title 18 of the California Code of Regulations, as that section read on September 1, 2017, however identified, including by any unique identifier.[18]

This broad definition could be read to include employees and individual business representatives, even though they are not in fact "consumers" as that term is commonly understood. The unintended consequence would be to endow personnel, freelance journalists, and vendors who are California residents with privacy rights designed for those who have a true consumer relationship with a business. This would also create tension with existing California and federal laws in the employment and fraud prevention space, among others, designed to protect employees and businesses alike. The recently proposed Washington state Privacy Act (Senate Bill 5376) explicitly excludes employees and contractors from its scope, and the Attorney General should interpret the CCPA in the same way.

The definition of "consumer" is also problematic because California residence is defined by tax provisions that deem an individual a resident even if he or she is temporarily located outside of California. As such, "businesses" that commonly use IP addresses, billing addresses or delivery addresses to determine the location of a consumer will be stymied in their ability to determine whether an individual is even covered by the CCPA. The Attorney General should issue rules approving the use of location indicators such as IP address as a proxy for residency, so that "businesses" are not forced to apply the CCPA to individuals located in each of the fifty states and the law does not risk being found unconstitutional.

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[17] CIV. CODE §1798.140(l).
[18] CIV. CODE §1798.140(g).

v. Definition of Business Purposes

Current Definition of Business Purposes: The current definition of "business purposes" includes a list of seven activities that are business purposes.[19] The Attorney General should consider clarifying in its rulemaking that this list is exemplary and not exhaustive.

C. The Attorney General Should Issue Practical Guidance on the Meaning of a "Verifiable Consumer Request"

The CCPA requires the Attorney General to establish rules and procedures to govern a business's determination that a request for information received by a consumer is a verifiable consumer request, "including treating a request submitted through a password-protected account maintained by the consumer with the business while the consumer is logged into the account as a verifiable consumer request and providing a mechanism for a consumer who does not maintain an account with the business to request information through the business's authentication of the consumer's identity."[20]The Attorney General should clarify that a "verifiable consumer request" includes a request obtained from the email addresses or other identifier the covered business has in its records as the current email address or identifier of the individual making the request.

D. The Attorney General Should Issue Practical Guidance on an Icon in Lieu of "Do Not Sell" Language.

Publishers support the creation of a universal opt-out icon for interest-based advertising, noting possible consumer confusion and additional compliance costs associated with the lack of a common method as well as the benefit of using a standardized icon to increase of consumer transparency (as suggested by the EU Article 29 Working Party 's guidance on Transparency).

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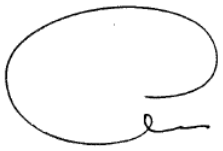
[19] CIV. CODE §1798.140(d).
[20] CIV. CODE §1798.185(a)(7).

IV. Conclusion

We appreciate the consideration of these comments of the news media industry and we offer our continued support for this effort to enhance the privacy protections of our readers while maintaining the ability to support quality journalism.

Sincerely,



David Chavern
President & CEO
News Media Alliance