PIFC

Date February 25, 2020

To: Privacy Regulations Coordinator
California Office of the Attorney General
300 South Spring Street, First Floor
Los Angeles, CA 90013
PrivacyRegulations@doj.ca.gov

SUBJECT: Comments regarding Department of Justice (Attorney General) February 10, 2020 modified proposal to adopt § 999.300 through 999.341 of Title 11, Division 1, Chapter 20, of the California Code of Regulations (CCR) concerning the California Consumer Privacy Act (CCPA).

Dear Attorney General Becerra,

The Personal Insurance Federation of California (PIFC) respectfully submits the following comments and concerns regarding the modifications to the proposed CCPA regulations first published on October 11, 2019.

The modifications to the proposed regulations resulted in some notable improvements, which we appreciate. However, the changes failed to address the vast majority of our concerns and some of the revisions exacerbate the many problematic aspects of the CCPA. Therefore, we remain very concerned that these regulations include significant new requirements that are causing insurers to alter their current compliance framework and communications protocol under an already tight implementation timeframe.

Given the complexity of the regulations, and the fact that certain provisions of the proposed regulations exceed the substantive and procedural scope of the statute, *we reiterate our request that the effective date of the regulations be at least 18 months from final issuance of the regulation.* Companies must have reasonable time to come into compliance with these comprehensive rules, and the CCPA grants the Attorney General discretion to delay enforcement of the regulations.

We provided extensive comments regarding the original draft regulations on December 4, 2019. Thus, the comments below will focus on the most recent changes.

Proposed § 999.302. Guidance Regarding the Interpretation of CCPA Definitions

(a): The newly proposed guidance regarding the definition of "personal information" (PI) is an improvement relative to the prior draft regulations. However, we have significant concerns about the lack of clarity regarding the language "*...or could be reasonably linked....*"

Government Code section 11349(c) defines "clarity" as meaning "...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The clarity standard is further defined in section 16 of title 1 of the California Code of Regulations (CCR), which provides, among other things, that a regulation shall be presumed not to comply with the "clarity" standard if the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning.

Since it is unknown what that phraseology means in practice, and it could be interpreted many different ways, we request that the words "*or could be reasonably linked"* be deleted. Further, there is no purpose to having such language if the information is not, in fact, ever linked to any consumer or household.

Proposed §999.305 Notice at Collection of Personal Information

(a)(3)(d): The regulation provides that *"When a business collects personal information over the telephone or in person, it may provide the notice orally."*

This could be interpreted to mean reading the entire notice over the phone, which may be impractical for both the business and the consumer. Therefore, we request that an option to orally ***direct the consumer to where the notice can be found online*** be added to the regulation.

(4): The proposed regulation requires that *"When a business collects personal information from a consumer's mobile device for a purpose that the consumer would not reasonably expect, it shall provide a just-in-time notice containing a summary of the categories of personal information being collected and a link to the full notice at collection."*

We are concerned that determining the consumer's "reasonable" expectations is subject to great interpretation, and the screen size and character limits may make just-in-time notices impractical. Therefore, we request that the regulations be amended to simply require a link to the full terms, which is a better approach for all parties.

Proposed § 999.314. Service Providers

The regulations restrict service provider retention, use or disclosure of personal information except for enumerated purposes that are much narrower than what is permitted under CCPA (Civil Code Section 1798.140(v)). Among other things, in the definition of a service provider, the CCPA permits the provider to retain, use or disclose the PI "*as otherwise permitted by this title.*"

We request that the draft regulations be amended better align with the statute, and not be unnecessarily restrictive or go beyond that envisioned by the CCPA as enacted.

Proposed § 999.315. Requests to Opt-Out

(c): The regulation provides that "*A business's methods for submitting requests to opt-out shall be easy for consumers to execute and shall require minimal steps to allow the consumer to opt-out."*

The terms "easy" and "minimal" are subjective standards that lack clarity because they can be reasonably and logically interpreted to have more than one meaning. We request that this requirement be removed from the regulation.

(a)(d)(e)(g): The notion of using global privacy controls is inconsistent with CCPA law. The CCPA envisioned express opt-outs, but the proposed regulations impose a broad opt-out election that could remove the opt-out choice as it would apply to specific industries, uses, and companies, and

would instead imply that a consumer wants it to apply universally. Insurers should not be lumped into publisher side digital advertising.

In addition to this inconsistency, it is unworkable. The proposed regulation seeks to impose a requirement, which from a technology standpoint, may not be feasible. The technology to track and honor such signals simply is not available. The proposal considers browser enabled privacy controls or plugins/cookies as do-not-sell requests coming from the consumer. The problem is that website operators generally do not know who the consumer is when browsing the site and may not be able to tie the opt-out request to a specific consumer. Recognition of the lack of readily available technology is one of the main reasons that a federal law was never passed mandating consumer choice relative to online behavioral advertising. Therefore, we request that the requirement be removed from the regulations.

Proposed § 999.317. Training; Record-Keeping

(2): The proposed modification sets an annual, July 1 deadline for updating response metrics in the privacy policy. Our previous comments raised serious concerns about the unnecessary and costly burden being imposed by the requirement to gather and post these metrics. The CCPA did not include any such requirement.

Adding a calendar deadline seems arbitrary and unnecessary so long as the company posts the metrics annually. To be clear, we continue to request that the record-keeping requirement be removed from the regulations, but at a minimum the calendar date should be deleted.

Proposed § 999.318. Requests to Access or Delete Household Information

This regulation prohibits complying with a request to know specific pieces of personal information about a household, unless all consumers of the household jointly request access, and the business individually verifies all members and their current status as a household member.

We are concerned that, for example, cookies or online tags used for tracking purposes may be associated with a household and there would be no harm to delete the information - in fact, this may be exactly what the consumer wants.

This provision would prohibit honoring the deletion request without verifying the identity of all household members, which may, as a practical matter, be impossible. Rather than making this an absolute prohibition, we request that the regulation be amended to allow it to be within the discretion of the business. In making this choice, the regulations could direct the business to give due consideration to the sensitivity of the personal information and risk of disclosure to unauthorized parties.

Proposed § 999.323. General Rules Regarding Verification

(d): This proposed regulation provides that "*A business shall not require the consumer to pay a fee for the verification of their request to know or request to delete.*" The example provided indicates that a business may not require a consumer to provide a notarized affidavit to verify their identity unless the business compensates the consumer for the cost of notarization.

This change is inconsistent with the CCPA because that law was not intended to ***decrease*** a business' ability to prevent of identity theft and fraud, yet the modified proposed regulation could

minimize use of an important tool – notarized affidavits – for a business to confirm an individual's identity before providing certain information could be meaningfully restricted. In fact, for the benefit and protection of consumers this practice should be explicitly permitted; therefore, we request the following amendment:

(d) A business shall not require the consumer to pay a fee for the verification of their request to know or request to delete. ~~For example~~ However, a business may ~~not~~ require a consumer to provide a notarized affidavit to verify their identity ~~unless the business compensates the consumer for the cost of notarization~~.

Financial services including insurers, based on the information, may be more sensitive to validating before releasing information than other industries. Therefore, the need to notarize a form may arise more often. In some cases, such as when the individual does not have an account or has insufficient information on hand, securing a notarized document may be the only realistic way to verify an identity of the requestor. Requiring reimbursement/compensation, may negatively impact the feasibility of this option and create tremendous operational challenges. Given the importance of notarization as a verification tool, it is important that the regulation not be overly burdensome and restrictive with regard to ability to use it.

Proposed § 999.336. Discriminatory Practices

(g): The regulation provides that "*A price or service difference that is the direct result of compliance with federal law shall not be considered discriminatory.*"

Consistent with the intent of this section, it would make sense to include state laws. Therefore, we request the proposed regulation be amended as follows:

"A price or service difference that is the direct result of compliance with federal ***or state*** *law shall not be considered discriminatory."*

Conclusion

As noted in our previous letter, per the "Notice of Proposed Rulemaking Action", Government Code section 11346.5, subdivision (a)(3)(D) requires the Attorney General to evaluate whether the proposed regulations are inconsistent or incompatible with existing state regulations. After conducting a review for any regulations that would relate to or affect this area, the Attorney General concluded that these are the only regulations that concern the CCPA. "The Attorney General has determined these proposed regulations are not inconsistent or incompatible with any existing state regulations, because there are no existing regulations that address the specific subject matter of the proposed regulations."

We believe this assertion is factually inaccurate. For insurers, the California Department of Insurance (CDI) is charged with protecting insurance consumers and currently and fully regulates the insurance business, specifically including the implementation and enforcement of the Insurance Information and Privacy Act [CA Insurance Code Section 791] and the market conduct practices of insurers doing business in California.

The challenge with multiple regulators promulgating regulations, examining conduct and taking enforcement action is significant. A more effective and efficient solution is to charge regulators that already oversee industries with the enforcement of the rules relating to that industry, in this case the CDI over the insurance industry. The CDI has staff expertise in insurance and privacy, and

procedures for examining insurer conduct and handling consumer complaints in place. Therefore, we strongly recommend that the Attorney General defer to the CDI regarding investigation (market conduct) and/or enforcement of the CCPA.

We appreciate the Attorney General's willingness to work with stakeholders, but it is clear that much more work needs to be done to develop fair regulations that can be implemented in a manner that best serves Californians. We look forward to continued work on these important regulations.

Sincerely,

Seren Taylor
Senior Legislative Advocate