CALIFORNIA CONSUMER PRIVACY ACT NON-BINDING GUIDANCE FOR SERVICE PROVIDERS

A TOOL FOR MARKETERS, MARKETING SOLUTIONS PROVIDERS AND BEYOND TO NAVIGATE CCPA COMPLIANCE

DECEMBER 2020
Foreword

The ANA works consistently to advocate for and support the needs of members across a wide variety of legislative and regulatory issues at the state and federal levels. One law that has become an area of significant consideration for marketers and consumers is the California Consumer Privacy Act (CCPA). The law provides important privacy protections for consumers and imposes new responsibilities on data providers, brands, advertisers, and a host of others in the advertising and marketing industry.

In response to the CCPA, the ANA has taken several important steps to help members navigate and interpret the law’s requirements and develop strategies to help facilitate compliance. This document, titled the California Consumer Privacy Act Guidance for Service Providers, provides a set of nonbinding principles and best practices to assist ANA members and the industry in meeting the requirements of the CCPA.

The Guidance was created by a group of ANA members, with assistance from Venable LLP, in order to share recommendations for managing and protecting consumer privacy. It is important to note that there is no one way to meet the CCPA requirements. This document, as the title implies, provides ANA members and the industry with guidance for just one path forward.

The ANA continues to work on your behalf as we traverse the legal and regulatory landscape. Initiatives such as Privacy for America, established by the ANA, 4As, IAB, and NAI, which is a coalition that supports the enactment of federal consumer data privacy and security legislation. If you have questions about the CCPA, Privacy for America, the Partnership for Responsible Addressable Media (PRAM), or other state and federal legislation impacting marketers’ ability to manage privacy issues, please reach out to:

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ASSOCIATION OF NATIONAL ADVERTISERS’
CALIFORNIA CONSUMER PRIVACY ACT NON-BINDING GUIDANCE FOR
SERVICE PROVIDERS

The Association of National Advertisers’ (“ANA”) California Consumer Privacy Act Non-Binding Guidance for Service Providers was designed as an analytical framework (the “Framework”) to provide entities that operate as “service providers” under the California Consumer Privacy Act of 2018 and its implementing regulations (“CCPA”) with approaches for facilitating compliance with that law while continuing to provide innovative products and services to the marketplace. The CCPA Service Provider Working Group (“Working Group”) is comprised of members of the ANA that convened, with assistance from Venable LLP, to develop a non-binding, consensus-based approach to operationalizing the obligations and allowances placed on and granted to service providers under the CCPA.

The mission of the ANA is to drive growth for marketing professionals, brands and businesses, the industry, and humanity. The ANA serves the marketing needs of 20,000 brands by leveraging the 12-point ANA Growth Agenda, which has been endorsed by the Global CMO Growth Council. The ANA’s membership consists of U.S. and international companies, including client-side marketers, nonprofits, fundraisers, and marketing solutions providers (data science and technology companies, ad agencies, publishers, media companies, suppliers, and vendors). The ANA creates Marketing Growth Champions by serving, educating, and advocating for more than 50,000 industry members that collectively invest more than $400 billion in marketing and advertising annually. This Framework is not legal advice. ANA is providing this non-legal guidance to its members as a service.

In the context of advertising, service providers offer a variety of tools and products to their clients in order to facilitate their advertising and marketing activities. These tools include products that rely on algorithms and machine learning techniques that help power a client’s efforts to execute effective and measurable advertising and marketing campaigns. The Working Group’s goal is to identify an analytical approach to help service providers—and in turn their clients—understand when they may leverage personal information from across their clients for internal uses of data to help build and improve a service provider’s products and services. Through such an analytical framework, service providers can continue to provide and improve valuable tools that use personal information while remaining “service providers” under the CCPA.

The Framework sets forth the scope of the document and the objective it sets out to accomplish. It then discusses the existing legal framework under the CCPA, including

* This analysis is based on the CCPA regulations in effect as of August 14, 2020 and does not reflect other pending changes to the law, such as proposed regulations or the California Privacy Rights Act of 2020 (“CPRA”). Companies should continue to monitor all legal and regulatory developments, including those related to the CPRA and regulations, to inform their approaches to legal compliance as the landscape continues to evolve.
references to the California Office of the Attorney General's ("AG") stated interpretation of the law's service provider requirements. The document then articulates a suggested principle for service providers to use when analyzing their use cases in the context of CCPA requirements, tasking service providers with identifying when their use of personal information is an internal use to improve their products, and when a use is targeted at external clients to provide a service to the client. The Framework concludes by applying the suggested principle to certain data use cases to illustrate its approach.

The Framework that follows is not legal advice. Compliance with the CCPA is a novel area. Companies should follow all developments and should consult with their own counsel.
FRAMEWORK

I. Scope

The CCPA places a set of restrictions on “service providers” that limit how a service provider may retain, use, and disclose personal information on behalf of its clients in the course of providing services. The purpose of this document is to analyze the restrictions created by the CCPA on service providers when they use personal information obtained through their client’s use of a product or service to build or improve the service provider’s product offerings.

II. CCPA Legal Framework

When acting as a service provider, the CCPA requires the service provider to be contractually limited in how it may use personal information provided to it or obtained on behalf of a client to deliver services to that client. However, the service provider is allowed to make limited uses of client-provided personal information for internal purposes beyond providing the services requested by the client.

In relevant part, the CCPA’s implementing regulations state:

(c) A service provider shall not retain, use, or disclose personal information obtained in the course of providing services except:

(1) To process or maintain personal information on behalf of the business that provided the personal information or directed the service provider to collect the personal information, and in compliance with the written contract for services required by the CCPA...[or]

...

(3) For internal use by the service provider to build or improve the quality of its services, provided that the use does not include building or modifying household or consumer profiles to use in providing services to another business, or correcting or augmenting data acquired from another source.4

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1 All terms used in this document have the meaning as defined by the CCPA.
4 Cal. Code Regs. tit. 11, §§ 999.314(c)(1), (3).
The AG provided an official Final Statement of Reasons ("FSOR") that states the AG's explanations for issuing the final regulations. In reference to the provisions of the CCPA’s implementing regulations that are reproduced above, the AG stated the following in the FSOR:

[S]ubsections (c)(1) and (c)(3) appropriately balance allowing service providers to offer robust, innovative services to the business that has a direct relationship with the consumers while at the same time protecting consumers from having their personal information functionally made available to other businesses.6

The AG stated in the FSOR that subsection (c)(1) (the "External Use Provision") was included in the final regulations to make clear that a service provider cannot use personal information obtained on behalf of a client to “provide services to a third party because such services would not be ‘on behalf of the business that provided the personal information.’”7 Further, the AG stated that subsection (c)(3) (the “Internal Use Provision”) was included to avoid circumstances where service providers would be unable to make “technical improvements to their services if the improvements in any way used personal information, including personal information collected from multiple businesses.”8

The AG also stated in the FSOR that the Internal Use Provision does not allow “personal information acquired from or on behalf of one business [to] be used to provide services to another business.”9 According to the AG, these limitations on the internal use of data are meant to “ensure that a service provider’s internal use of personal information does not functionally operate to make personal information available to multiple businesses,” which the AG states would be a “sale” under the CCPA and be counter to the External Use Provision.10

To illustrate the distinction between permissible and impermissible uses of personal information, the AG provided two examples. First, the AG made clear in the FSOR that a service provider could analyze how a client accesses personal information through customer relationship management software and “make improvements using

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6 FSOR at 34.
7 Id. at 33.
8 Id. at 34.
9 Id.
10 Id. The AG also stated that the use of the term “data” in the exception’s provision prohibiting the internal use of client personal information to correct or augment data acquired from another source is meant to be broader than the CCPA’s definition of personal information in order to make clear that client personal information cannot augment data outside that definition, such as, for instance, reidentifying deidentified data. Id.
that analysis.”\textsuperscript{11} Such a use case is allowed, according to the AG, because the improvement of the software does not involve the use of a client’s personal information to “build or modify consumer profiles to service a different business” or the correction or augmentation of data acquired from another source.\textsuperscript{12} Second, the AG stated that a service provider could obtain mailing addresses from a client to send mail to that client’s customers, but that the Internal Use Provision would “prohibit the service provider from reusing the consumer’s address to send mail on a different business’s behalf or to internally update the consumer’s address on mailing lists maintained for others.”\textsuperscript{13} In the first example, the service provider uses personal information to improve its service but does not make that information available to other clients, and in the second example, the service provider would be prohibited from transferring personal information (the mail addresses) from one client to another.

III. Suggested Principle

Based on the final regulations and the FSOR discussed above, service providers are allowed to (1) use personal information obtained from or on behalf of a client to provide the products that are contracted for by that client (an “\textbf{External Use}”) and (2) use personal information obtained from or on behalf of a client to build or improve its products as long as that internal use does not build or modify profiles or correct or augment data obtained from another source (an “\textbf{Internal Use}”). A key facet of the analysis that companies should undertake is to focus on whether the use of personal information obtained from or on behalf of a client is functionally made available between its clients.

Based on that principle, a service provider could assess its operations in order to classify activities that occur under the \textbf{External Use Provision} of the regulations and those that occur under the \textbf{Internal Use Provision}. Delineating activities in this manner can help service providers maintain compliance with the CCPA and their contracts with clients when providing products to those clients by limiting how a client’s data is used in a service. Doing so can also help a service provider determine when it can use client data internally by running it through algorithms and/or machine learning functions to train, improve, and build better products and services to offer in the marketplace.

A bifurcation between External Uses of data to deliver products and services to clients and Internal Uses of data to improve and build those products and services could help service providers understand what datasets may be used for which of those purposes. For example, if a service provider offers a product to help clients identify when to send marketing messages to a customer, using the client’s personal information to provide that product to the customer would be considered an \textbf{External Use} subject to regulation 999.314(c)(1). The service provider can also internally use data from clients

\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
to improve the service provider’s products, but that **Internal Use** is subject to the restrictions of regulation 999.314(c)(3), including the prohibitions on modifying consumer profiles, correcting data, or augmenting data acquired from another source. When that now improved product is offered to the marketplace without any client-provided data being disclosed to another client, it is subject to regulation 999.314(c)(1), not the restrictions imposed by 999.314(c)(3).

When a service provider uses client data for an Internal Use subject to the restrictions in regulation 999.314(c)(3), the AG’s example use cases are instructive when analyzing what activity qualifies as an Internal Use. When discussing the correction of mailing addresses, the AG indicated that the use of one client’s address list to update the service provider’s profile for a consumer or correct another client’s data would be an improper Internal Use, because this practice would either modify a profile or augment another client’s data. However, the AG also stated that analyzing how a client uses a customer relationship management software (“CRM”) product to access and use the client’s personal information in order to improve that product offering itself for all users is an appropriate Internal Use under the regulations. In the AG’s CRM example, the service provider can see that Client A’s use of the product resulted in higher engagement due to how Client A used the software, analyze why that increase in engagement occurred, and improve the CRM software to help Client B also increase engagement through Client B’s instance of the CRM software. In this example, the service provider uses personal information to improve its product, and does not functionally make that personal information available to multiple clients. Therefore, a service provider could take the position that it is allowed to use a client’s personal information and information regarding how the client uses the service provider’s products to improve the underlying offering, as long as the client’s personal information itself is not used to modify a consumer profile or augment another client’s personal information directly.

**IV. Use Case Analysis**

The analysis described in Section III is applied below to three illustrative use cases: (1) list hygiene, (2) CRM software databases, and (3) optimization. The section proceeds by describing a data use case and then applying the analysis presented above. **These examples are not legal advice. Each entity should perform its own assessment regarding its unique, fact-specific use cases to confirm whether they represent an Internal Use case or an External Use case.**

1. **List Hygiene.** A service provider maintains two clients, Client A and Client B. Both clients contract with the service provider to provide advertising and marketing services for direct mail campaigns. Client A maintains a record on John Smith, a California consumer, that includes his home address and demographic information. Client A provides such personal information to the service provider for processing on its behalf subject to the External Use Provision. Client B also maintains a record with personal information about John Smith, but does not have a home address for him.
If the service provider updates Client B’s record on John Smith to include his address obtained from Client A’s record, that data is “personal information acquired from or on behalf of one business... used to provide services to another business.”\textsuperscript{14} The act of combining such information would constitute “building or modifying household or consumer profiles,”\textsuperscript{15} and therefore would not meet the requirements set forth in the Internal Use Provision of the CCPA regulations. Transferring the personal information provided by one client (Client A) to another (Client B) would not constitute an Internal Use of personal information to improve products or services as such use is described in the Internal Use Provision, because the service provider is making personal information from one client available to another.

2. **Customer Relationship Management Software.** A service provider separately contracts with Client A and Client B to provide a customer relationship management software (“CRM”) database. According to the terms of the contracts, the service provider may use personal information the clients provide to the service provider pursuant to the External Use Provision to provide the CRM database. Client A uses the CRM database with its personal information about its customers to run various advertising campaigns. Through those campaigns, the service provider observes that Client A’s campaigns for home cleaning products perform better on websites related to outdoor leisure activities. The service provider observes this fact, and builds it into the algorithm and machine learning functionalities that power the CRM database such that the software recommends that Client B’s advertisements for cleaning products prioritize placement on outdoor leisure activities properties instead of other websites.

In this use case, the service provider observes Client A’s use of its software and the client’s personal information in a way that improves the reception of Client A’s advertisements. The service provider then uses that observation to improve the ability of its product, the CRM database, to help other clients improve advertising campaigns based on learnings from Client A’s campaigns. One determinative factor in why this scenario is a permissible Internal Use is because the service provider does not transfer or make available any personal information of Client A’s to Client B. Instead, the service provider’s product is improved through its observation of Client A’s use of personal information in the CRM database software.

3. **Optimization.** A service provider has two clients, Client A and Client B. Using the service provider’s technology, each Client runs separate ad campaigns under the External Use Provision. Client A’s campaign is run in Michigan and advertises black running shoes. Client B’s campaign is run in California and advertises green

\textsuperscript{14} FSOR at 34.
\textsuperscript{15} Cal. Code Regs. tit. 11, §§ 999.314(c)(3).
hiking boots. In running these campaigns, the technology learns from individual consumer interactions that people in Detroit respond best to Client A’s advertisements when they are served to mobile devices before 9 a.m. Eastern Time. Similarly, the technology learns that individuals in California respond best to Client B’s advertisements when they are served to mobile devices after 9 p.m. Pacific Time.

The service provider’s technology can take these insights and incorporate them into its systems, which recommend the time of day during which to serve future advertisements for shoes. The service provider can then help clients optimize future ad spend through choosing the most effective time of day to serve advertisements for shoes or other products in each region. This improvement to the service provider’s offerings constitutes an Internal Use of personal information to improve products and services. This practice is not an External Use because the service provider is not making personal information it obtained from or on behalf of Client A or B functionally available to another business. Instead, the service provider is internally gleaning insights from Client A and/or B’s use of the service to improve its overall offering for the benefit of all the service provider’s clients.

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