

## The NetChoice Coalition

*Promoting Convenience, Choice, and Commerce on The Net*

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Assembly Judiciary Committee;  
Assembly Business, Professions & Consumer Protection Committee; and  
Assembly Select Committee on Privacy  
The Louis B. Mayer Theater at Santa Clara University  
Santa Clara, CA 95050

### **RE: NetChoice Testimony For Informational Hearing On Balancing Privacy And Opportunity In The Internet Age**

California should take a “light-touch” approach to regulation of the collection and use of pseudonymized information. To do otherwise threatens California’s leadership in delivering the free online services enjoyed around the world.

#### ***Avoid Opt-In consent for interest-based ads.***

Online interest-based advertising provides most of the funding that enables websites to create content and develop new services. Interest-based ads rely on collection of non-identifying data about users’ web browsing and the sites and subjects they frequent most. Presently, consumers can opt-out of this kind of interest tracking. California should not mandate that websites obtain express user consent (opt-in) before they collect or use non-personal data.

#### ***Do not follow the EU Approach***

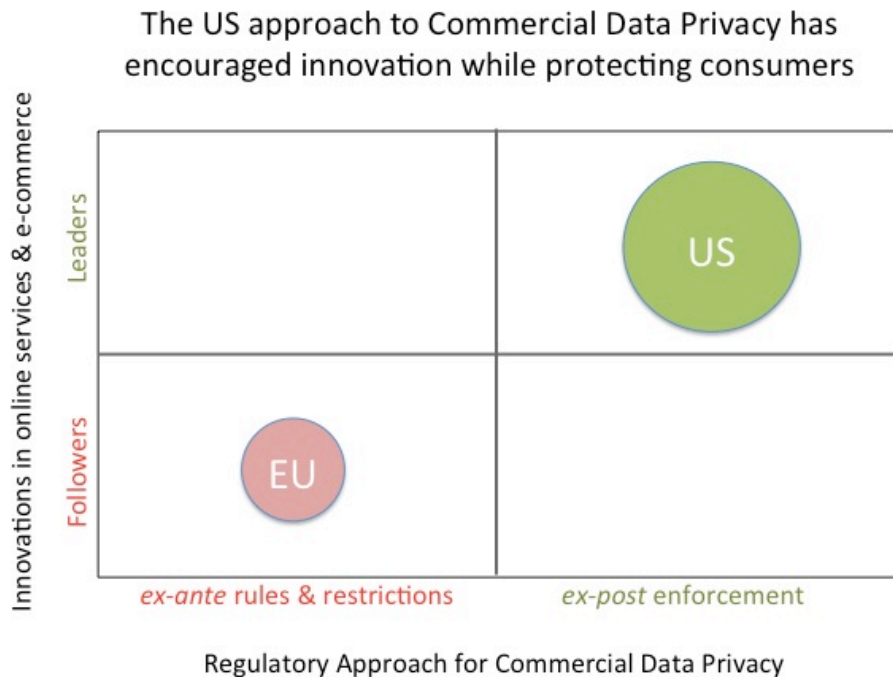
California is not the first government to attempt an opt-in regime for non-personal and non-sensitive user data. Parts of the European Union (EU) required Opt-in and saw a significant loss in the effectiveness of online advertising.

In large part, the success of online commerce is owed to a conscious, deliberate, hands-off policy of US policymakers. Thus far, the California government has allowed the Internet to develop mostly without prescriptive regulation while still vigorously enforcing consumer protection laws and holding companies to the privacy policies and programs they have voluntarily embraced. This general application of law has helped California businesses grow and create jobs.

This is not the norm in Europe, which regulates with prescriptive and restrictive rules based on fundamental privacy rights. European consumers—no matter how well-informed—cannot bargain, consent to, or otherwise waive these privacy rights. In other words, consumers have no choice to participate in the kinds of consensual data collection and use practices that are typical in the US. If applied to American companies, these European laws would restrict the breakneck innovation of the commercial web.

Legislation would necessarily either *require* or *prohibit* certain conduct. For dynamic information industries, a legislative approach is antithetical to the sort of dynamism that allows an innovator to create new ways to manage privacy or increase the efficiency of e-commerce. And, as is often the unfortunate consequence, entrenched incumbents can use existing law to delay or deter new competitors.

The chart below is a conceptual way to contrast the EU and US approaches to the regulation of commercial data privacy:



NetChoice supports a voluntary and dynamic program to create and enforce commercial data privacy principles. The key is to retain the vibrancy of the market in policy and to enforce laws against bad actors instead of prescribing rules covering entire industries. We note that there is a growing movement in the EU toward this sort of *ex post* enforcement and regulation of commercial data privacy.

***An Opt-In mandate would cost California websites over \$4 Billion over 5 years.***

An MIT/University of Toronto Study<sup>1</sup> looked at results when five European governments required opt-in to restrict interest tracking for online advertising. The study compared the purchase intentions of over 3 million individuals across 5 EU and 5 non-EU countries over the 8 years after European nations began implementing opt-in requirements of the EU Privacy Directive.

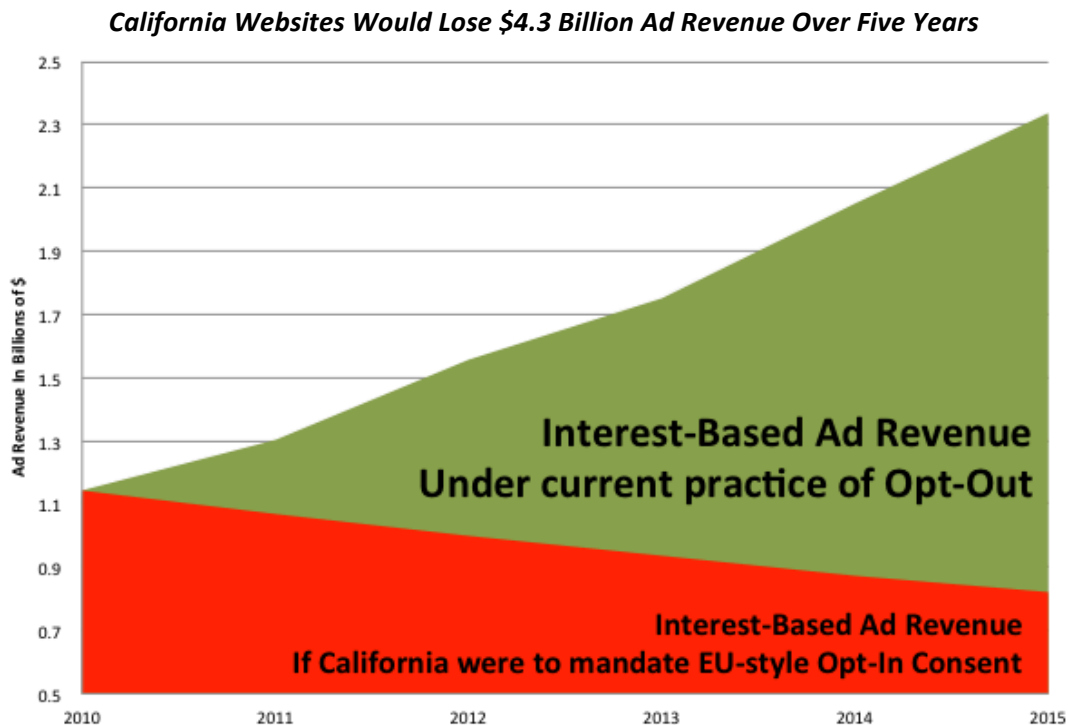
The MIT-Toronto Study found that after the EU adopted an opt-in model for interest-based advertising, “advertising effectiveness decreased on average by around 65 percent in Europe relative to the rest of the world.”

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<sup>1</sup> Goldfarb & Tucker, *Privacy Regulation and Online Advertising*, Univ. Toronto & MIT (Aug-2010).

The study also found that subtle, low-key ads were most hurt by the opt-in approach. So, to make up for the lack of relevance to the user, ads must become more abundant, more aggressive and more intrusive to the user experience.

Building off the MIT-Toronto findings, NetChoice can forecast the effect that EU-style opt-in legislation would have on California websites:



Moreover, a recent Harvard Business School/Columbia University study found that direct-marketing accounts for more than \$10 billion in revenue and 46,000 jobs in California alone.<sup>2</sup>

***Over regulation harms Internet startups and emerging websites the most.***

Established Internet leaders may be able to convince many of their users to opt-in for data collection, despite today's inflated rhetoric over privacy concerns. But new, lesser-known companies would find it far more difficult to entice users to opt-in, even just for non-personal data. This would decrease competition in Internet space and perhaps slow the exciting growth California businesses have enjoyed.

***Preventing data collection for online ads and services would harm California consumers, too.***

As a result of an opt-in regime, Internet advertising in California could see a \$4 billion decline in ad revenue over the first 5 years, with three predictable results:

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<sup>2</sup> See, John Deighton & Peter Johnson, *The Value of Data: Consequences for Insight, Innovation and Efficiency in the U.S. Economy*, available at [thedma.org/valueofdata](http://thedma.org/valueofdata)

1. Californians will see more and larger ads that are less relevant, as websites attempt to make-up lost revenue from the decline in interest-based ads
2. Websites will have less funding to pay for new services and content
3. Some websites will erect “pay walls” that require users to fund content and services that are free today

***California’s world-leading Internet innovators would be impacted by broad regulation.***

California prides itself on its technology and business innovators. However, many of California’s leading online companies would be among those harmed most by strong regulation of the internet. Companies such as Facebook, Yahoo!, and Google rely heavily on light-touch regulation. New regulations and legislation would dramatically reduce innovation, services, and possibly jobs.

***Avoid broad regulations.***

Now is not the time for California to emulate mistakes made by the European Union in its experiment with online privacy. Please don’t deprive California of the benefits of online services that are now the envy of the world.

Thank you for considering our views and please let me know if we can provide further information.

Sincerely,



Carl M. Szabo  
Policy Counsel, NetChoice

*NetChoice is a trade association of e-Commerce businesses who share the goal of promoting convenience, choice and commerce on the Net. Learn about NetChoice at [www.netchoice.org](http://www.netchoice.org)*