California Department of Justice
February 25, 2020

Re: *Comment on the Proposed Changes to the California Consumer Privacy Act (OAL File No. 2019-1001-05)*

The California Consumer Privacy Act should include explicit language that accounts for the case in which an authorized agent is acting on the behalf of a consumer who has passed away. This is a situation where the authorization of a third party agent to act on behalf of a user is implicit, and should be considered a lawful situation through which a consumer's data may be handled by an authorized agent. Because the underlying legislation authorizing the CCPA does not explicitly define the cases in which an agent can be authorized, we believe that this is a valid interpretation of the text and should be included in the regulation updates.

Based on our fellowship research with the Aspen Institute at the Aspen Technology Policy Hub, we respectfully suggest the following for your consideration:

I. Rights to request or delete data by an authorized agent should be expanded to apply to court-appointed executors in the event that a consumer dies intestate, or to an explicitly-named custodian as specified through a consumer's will or trust. As written, the proposed changes to section § 999.326 would make it more difficult for court-appointed agents to act on behalf of a deceased consumer. Therefore, sections (b) and (c) should be updated to include explicit language to support CCPA requests on behalf of a consumer posthumously.

II. The newly added section (e) in § 999.326 should be updated to allow use of information to the extent that it allows an authorized agent to manage a deceased consumer's estate. As written, this section would make it difficult for an authorized agent to manage a deceased user's digital assets. Section (e) should include an explicit approval to the activities that are required of an authorized agent to manage a deceased user's property.

Extending Authorized Agent Rights to Executors of an Estate

While some consumers may grant a power of attorney to act on their behalf, in practice, this is not representative of how the general population plans for incapacitation. In practice, 56% of Americans die without a will or trust established[1] and their estate executors are court-appointed under intestate succession laws. In these instances, a power of attorney document may not have

[1] Gallup, 2016: https://news.gallup.com/poll/191651/majority-not.aspx

been created, but an executor of an estate should be able to file requests under CCPA in order to effectively manage the decedent's online data that is held by online companies.
The CCPA should cover a wider range of authorized agents who can act on behalf of a user. For example, an estate's executor should be able to file requests under the CCPA on behalf of the decedent they represent. The existing text of the CCPA rightfully considers the case where an authorized agent may be acting on behalf of a deceased or incapacitated consumer, as stated in § 999.326 (b).[2]

The presumed intent of this section is to facilitate access to a consumer's information when that user has authorized a fiduciary agent under a power of attorney[3] in preparation for posthumous estate management, but the current scope is insufficient. By explicitly limiting the mechanic by which a user can authorize an agent to be restricted to the scope of the power of attorney, the current text excludes the other ways that an agent could be legally authorized on a consumer's behalf.

To include conservators as authorized agents within the context of the CCPA, we suggest the following changes to § 999.326 (b) and (c):

> (b) Subsection (a) does not apply when a consumer has provided the authorized agent with power of attorney pursuant to Probate Code sections 4000 to 4465 or is acting as the conservator of an estate pursuant to Probate Code sections 2400-2595.
>
> (c) A business may deny a request from an authorized agent that does not submit proof that they have been authorized ~~by the consumer~~ to act on ~~their~~ behalf of the consumer through direct authorization by the user or through a court order.

§ 999.326(e) Exemptions for Authorized Agents Managing Estates

Section (e) should be expanded to allow authorized agents to request information as required to manage a user's estate upon their death. The phrase '*to fulfill the consumer's requests*' implies that there is an understood need for agents to act on behalf of a consumer who is unable to act on a request directly, but in the event of an intestate death the consumer's request may be implicit rather than explicitly requested. Alternatively, a consumer may have granted power of attorney to an authorized agent, but not explicitly stated how their data should be managed or destroyed.

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[2] "*Subsection (a) does not apply when a consumer has provided the authorized agent with power of attorney pursuant to Probate Code sections 4000 to 4465." - California Civil Code § 999.326 (b)*
[3] California Probate Code 4120 - 4130

As currently written, section (e) would prohibit a conservator of an estate from using the information to resolve an estate after a consumer has passed away if the death was intestate, but online providers increasingly hold valuable data related to a consumer's property. Section (e) should recognize this as a valid motivation of an authorized agent to request data from a consumer when the request is made posthumously. We propose the following changes to section (e):

> (e) An authorized agent shall not use a consumer's personal information, or any information collected from or about the consumer, for any purpose other than to fulfill the consumer's requests, to resolve the estate of a deceased user, for verification, or for fraud prevention.

Appendix A includes two additional modifications that should be made to reflect the case where authorized agents are acting on behalf of deceased users in the event that the above changes are considered and accepted.

We appreciate the Department's time in reviewing the comments and proposal to updates to the California Consumer Privacy Act and are happy to be in further contact about our proposed changes.

Regards,

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on behalf of:

The Digital Afterlife Project
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Appendix A

Additional language changes to reflect authorized agents of deceased users

§ 999.301(c) - The definition for ‘Authorized agent’ should be expanded to include legal representatives acting on behalf of a deceased user in both intestate cases and when taken as part of a fiduciary duty through resolution of an estate, trust, or will of a decedent.

§ 999.315(g) - Authorizations should not require a signed document from the consumer if the authorized agent is authorized through a court order on behalf of a deceased consumer