



December 11, 2023

Colorado Department of Law
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203

RE: Joint Ad Trade Letter – Comments on Opt-Out Machine Application

Dear Colorado Department of Law:

On behalf of the advertising industry, we provide this set of comments on the Opt-Out Machine's application to become a recognized universal opt-out mechanism ("UOOM"). These comments explain that the proposed mechanism ("Opt-Out Machine") does not satisfy requirements of the CPA and highlight notice requirements the Opt-Out Machine fails to meet. Our comments also note several additional critical factors the Colorado Department of Law ("Department") should consider that weigh against naming the Opt-Out Machine as a recognized UOOM.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. These companies range from small businesses to household brands, long-standing and emerging publishers, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product ("GDP") in 2020.¹ By one estimate, over 150,000 jobs in Colorado are related to the ad-subsidized Internet.² We welcome the opportunity to engage with you further on the non-exhaustive list of issues with the Opt-Out Machine UOOM application that we outline here.

I. The Department should not recognize the Opt-Out Machine because it does not meet the technical specifications set forth in the CPA and Rule 5.06 of the CPA implementing regulations.

The Department should not include the Opt-Out Machine on the list of required UOOMs because the Opt-Out Machine fails to satisfy several technical specifications established by the CPA and its implementing regulations. The CPA requires controllers to process opt-out requests submitted via user-selected UOOMs only when those mechanisms "meet the technical specifications established by the Attorney General pursuant to section 6-1-1313."³ Those technical specifications include requirements established by the CPA and any rule promulgated by the Colorado Attorney General pursuant to the statute.⁴ The Opt-Out Machine fails to satisfy several

¹ John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located [here](#).

² *Id.* at 123.

³ Colo. Rev. Stat. § 6-1-1306(a)(IV)(B).

⁴ *Id.* § 6-1-1313.

technical specifications established by the CPA and its implementing rules and should therefore be excluded from the list of UOOMs controllers must honor.

a. The Opt-Out Machine does not automatically communicate consumers' opt-out choices with multiple controllers as required by Rule 5.06(A).

The Department should not approve the Opt-Out Machine because the Department has already rejected language recognizing mechanisms that operate similarly to that described in the Opt-Out Machine's application as a valid means of automatically communicating a consumer's opt-out preference. Current regulations require that a UOOM "allow for Consumers to automatically communicate their opt-out choice with multiple Controllers."⁵ During the rulemaking process, the Department considered a provision that would have allowed for a mechanism that operates "through a means other than by sending an opt-out signal, for example by maintaining a 'do not sell' list, so long as Controllers are able to query such a list in an automated manner."⁶ This provision was removed as a valid means of automatically communicating a consumer's preference, and current regulations require that a qualifying UOOM should communicate a consumer's choice only "by sending an opt out signal . . . in a format commonly used and recognized by Controllers."⁷

The Opt-Out Machine uses a manual email process that has already been rejected by the Department as a valid opt-out signal. According to the applicant's response to Question 5, the Opt-Out Machine operates by "reach[ing] out proactively to likely holders of consumer data via email."⁸ After a business receives an email from the Opt-Out Machine, the business is meant to treat the email as a valid opt-out request.⁹ Such an email communication mechanism would require the Opt-Out Machine to maintain a list of preselected controllers and correspond with each controller individually after a consumer signs up for the Opt-Out Machine's services. Controllers similarly would be required to monitor an email inbox and analyze individual email requests rather than respond to a signal automatically communicated to the controller's system. This process mirrors the non-signal option already rejected by the Department during the rulemaking process. Furthermore, the Opt-Out Machine application notes that automation is not currently used and only vaguely indicates that automation may be implemented "in the future."¹⁰ The Opt-Out Machine's admitted lack of automation prevents the proposed mechanism from satisfying the requirement that it "automatically communicate" a consumer's opt-out choice.

b. The Opt-Out Machine inhibits a controller's ability to determine whether a consumer is a Colorado resident or to verify the legitimacy of a request in violation of § 6-1-1313 and Rule 5.06(D).

The Department should reject the Opt-Out Machine application because the proposed mechanism violates the authentication requirements of § 6-1-1313 and Rule 5.06(D). Including a proposed UOOM that does not sufficiently allow for authentication on the list of required UOOMs

⁵ 4 C.C.R. 904-3, Rule 5.06(A).

⁶ 4 C.C.R. 904-3, Rule 5.06(A)(2) (proposed Jan. 1, 2023 draft).

⁷ 4 C.C.R. 904-3, Rule 5.06(A)(1).

⁸ Opt-Out Machine Application, Colorado Dept. of Law, at Question 5, available at <https://coag.gov/app/uploads/2023/11/Opt-Out-Machine-Application.pdf> [hereinafter "Application"].

⁹ *Id.* at Question 4.

¹⁰ *Id.*

would read out of the text of the CPA important provisions related to controller authentication of consumer requests. The regime contemplated by the Opt-Out Machine would force controllers to honor opt-out requests they otherwise would not without first obtaining important authenticating information from the consumer. In this way, the Opt-Out Machine's proposal conflicts with the authentication provisions in the statutory text of the CPA. Thus, rather than requiring controllers to honor all Opt-Out Machine opt-out requests, the Department should allow controllers to choose whether to honor an Opt-Out Machine opt-out request if the controller is unable to authenticate the request.

The Opt-Out Machine does not routinely require proof of identity, which is likely to hinder a controller's ability to authenticate the consumer as a Colorado resident in violation of the CPA and its implementing regulations. The CPA does not require controllers to comply with opt-out requests unless the request can be authenticated.¹¹ Although a UOOM provider does not itself have to authenticate a consumer is a Colorado resident, the CPA requires that a recognized UOOM must permit the controller to do so.¹² The Opt-Out Machine asks consumers to provide a physical address as a data matching tool "in all cases," but it requires consumers to provide proof of identification only "in some cases."¹³ Proof of identity is needed in addition to a physical address to ensure that a non-Colorado resident has not provided someone else's Colorado address for purposes of submitting a request. If the Opt-Out Machine does not have routine verification processes in place, controllers are unlikely to be able to consistently authenticate that an opt-out request was submitted by a Colorado resident. Adherence to UOOM signals that do not enable controllers to authenticate a consumer's state of residency should be optional rather than mandatory. Controllers should have the option to honor opt-out requests submitted via a UOOM that does not allow the controller to authenticate residency because the CPA mandates that controllers must be permitted to authenticate consumer requests.

c. The Opt-Out Machine unfairly disadvantages data brokers in violation of § 6-1-1313 and Rule 5.06(E).

The Department should not approve the Opt-Out Machine because the mechanism violates Rule 5.06(E) by unfairly disadvantaging certain controllers, namely data brokers. The CPA prohibits approved UOOMs from "unfairly disadvantage[ing] another controller."¹⁴ Per the Opt-Out Machine application, the proposed mechanism would submit opt-out requests only to "likely holders of consumer data via email, primarily Data Brokers."¹⁵ This proposed mechanism targets only a select group of controllers that the developers have identified as "likely holders of consumer data." Such an approach is unlikely to effectuate the CPA's stated purpose of providing a method by which consumers can "automatically exercise their opt-out rights *with all Controllers they interact with without having to make individualized requests of each Controller.*"¹⁶ The Opt-Out Machine's application provides no indication of how the proposed mechanism would determine which third parties it will email on behalf of consumers, leaving consumers with little information about whether opt-out requests will even be sent to all data brokers or other controllers that

¹¹ Colo. Rev. Stat. § 6-1-1306(2)(d).

¹² *Id.* § 6-1-1313(2)(f); 4 C.C.R. 904-3, Rule 5.06(D)(1).

¹³ Application at Question 7.

¹⁴ Colo. Rev. Stat. § 6-1-1313(2)(a); 4 C.C.R. 903-4, Rule 5.06(E).

¹⁵ Application at Question 5.

¹⁶ 4 C.C.R. 903-4, Rule 5.02(B)(emphasis added).

maintain personal data associated with the consumer. Instead, the Opt-Out Machine sends opt-out requests to the same list of “likely holders of consumer data” regardless of whether such entities actually maintain personal data about that consumer.

At the same time, the proposed mechanism arbitrarily limits data brokers’ use of data while ignoring thousands of other controllers that hold consumer data and with which a given consumer may interact. Thus, a consumer who uses the Opt-Out Machine to exercise their CPA rights is likely to opt out of data sales or sharing from only a fraction of controllers with which that consumer actually interacts, while sending unnecessary opt-out requests to other businesses with which the consumer has never interacted or that do not actually maintain personal data about the consumer. Such a model unfairly restricts data uses by a certain group of controllers—the group of controllers that happens to be on the Opt-Out Machine’s list at any given point in time. The mechanism could both inundate that select group with unnecessary opt-out requests that do nothing to advance the UOOM’s stated objectives and fail to communicate opt-out requests to other controllers who actually maintain data associated with the requesting consumer.

II. The Department should not recognize the Opt-Out Machine because it does not satisfy the notice requirements set forth in Rules 3.02 and 5.03 or protect against default settings as required by the CPA and Rule 5.04.

The Opt-Out Machine fails to clearly notify consumers of the scope of the opt-out right under the CPA and fails to provide sufficient assurances it will not be set by default, which violates CPA requirements and is likely to lead to unnecessary consumer confusion. The Opt-Out Machine’s public disclosures and application materials conflict and never clearly convey the scope of the opt-out to consumers. The Opt-Out Machine’s product and pricing pages, for example, describe the mechanism as a way to opt-out of data sales.¹⁷ In contrast, the Opt-Out Machine application describes the mechanism as handling all privacy-related requests, including the “Right to Opt-Out of the sale *or sharing*” as well as access, deletion, and correction requests.¹⁸ Similarly, the Opt-Out Machine’s Frequently Asked Questions page indicates that the Opt-Out Machine submits several other requests on behalf of consumers.¹⁹

Although an approved UOOM does not need to be specific to Colorado or to only opt-out rights, the regulations do require that a notice clearly describes the scope of the opt-out and preclude it from being set by default. CPA implementing regulations require that notices be both “understandable and accessible” and “straightforward and accurate.”²⁰ The regulations also explicitly require that a UOOM provider “make clear to the Consumer . . . that the mechanism is meant to allow the Consumer to exercise the right to opt out of the Processing of Personal Data for one specific purpose, either Targeted Advertising or the Sale of Personal Data, or both Purposes.”²¹

¹⁷ See Opt-Out Machine, Known Privacy Opt-Out Machine, available at <https://www.knownprivacy.com/products/opt-out-machine> (“Stop companies from selling your personal data.”); Pricing & Signup, Known Privacy Opt-Out Machine, available at <https://www.knownprivacy.com/pricing> (“Stop the sale of your data by hundreds of companies.”).

¹⁸ See Application at Question 19 (emphasis added).

¹⁹ See Frequently Asked Questions, Known Privacy Opt-Out Machine, available at <https://www.opt-out.ai/faq/> (“There are several privacy laws that give you privacy rights. One of the more important ones, the CCPA in California, give companies 45 days to comply with a request . . .”).

²⁰ 4 C.C.R. 903-4, Rule 3.02(A)(1), (7); *see also id.*, Rule 5.03(A)(1) (requiring that UOOM disclosures comply with Rule 3.02).

²¹ *Id.*, Rule 5.03(A)(1).

A tool marketed as a sales-only opt-out in some locations, a sales and sharing opt-out elsewhere, and a one-stop privacy rights shop in yet another location certainly does not provide consumers with a straightforward understanding of the scope of the opt-out. Such discrepancies are likely to cause consumer confusion about what a consumer is actually opting out of when signing up for the Opt-Out Machine's services and therefore fail to satisfy the consumer notice requirements of Rules 3.02 and 5.03.

Furthermore, according to the CPA itself and its implementing regulations, consumers must be allowed to make an informed decision about their opt-out rights, and no UOOM mechanism may transmit an "opt-out" signal for the user by default.²² The Opt-Out Machine's UOOM application does not describe how it will prevent such a scenario, nor does it make any commitments to abide by the CPA's requirements that an UOOM may not operate as a default setting. The Opt-Out Machine could consequently enable an entity to make an opt-out choice *for* the consumer rather than ensuring the choice is one that is made *by* the consumer. This result would undermine the consumer's rights under the statute. UOOM candidates should be required to clarify how they will protect against opt-out mechanisms being set by default to conform with the CPA's requirements for user transparency and control related to opt-out requests.

III. The Department should consider the Opt-Out Machine's lack of commercial adoption and high cost to consumers as additional factors that weigh against required recognition of the proposed mechanism.

In addition to the explicit technical specifications and notice requirements, the CPA regulations permit the Department to consider several optional factors that also weigh against including the Opt-Out Machine on the list of UOOMs that the controller must recognize. First, the regulations allow the Department to look at whether a proposed UOOM has been commercially adopted by consumers or controllers.²³ The Opt-Out Machine's application clearly demonstrates that is not the case. The proposed UOOM appears to still be in testing stages, as evidenced by the application's multiple references to ongoing solicitations of consumer and market feedback.²⁴ Notably, although the application indicates the Opt-Out Machine has undergone some testing, the applicant states that it is "not prepared to share the results yet."²⁵ Statements of compliance with other jurisdictions' UOOM requirements are similarly vague and rely on the applicant's own interpretation of the adoption of the mechanism without providing any examples that the interpretation has been accepted or has worked in the relevant jurisdiction.²⁶ Rather than demonstrating commercial adoption, such statements indicate a premature product that should be further tested by consumers and businesses before it is given the Department's "stamp of approval."

The Opt-Out Machine's high price tag should similarly counsel away from adoption as a Department-recognized mechanism. The regulations permit the Department to consider the "ease

²² Colo. Rev. Stat. §§ 6-1-1313(2)(b), (c); 4 C.C.R. 903-4, Rule 5.04.

²³ *Id.*, Rule 5.07(D)(1).

²⁴ *See, e.g.*, Application at Question 14 ("We have tested the application in the marketplace and have received feedback from both Consumers and Data Brokers."); *id.* at Question 20 ("Yes, it has been tested in real world settings . . . We are not prepared to share the results yet, but will in the future.")

²⁵ *Id.* at Question 20.

²⁶ *Id.* at Question 17 ("Our interpretation of the CPRA is that email is an acceptable form of communication . . . It is possible for others to interpret the [statutes] in such a way as to make counter arguments . . .").

and cost of use, implementation, and detection by Consumers.”²⁷ The Opt-Out Machine offers consumers two pricing options. The first is a \$30/year “Do-It-Yourself” option that appears to give consumers a template and list of data brokers consumers themselves must email. The second is a \$150/year option in which the Opt-Out Machine sends email opt-out requests on behalf of consumers. Although we maintain that neither option meets the CPA’s technical specifications because neither sends an opt-out signal that automatically communicates a consumer’s preferences, the \$30 option certainly should not be seen as a UOOM. Providing consumers with a list of controllers to manually contact by email in no way automatically communicates the consumer’s choice to multiple controllers and is therefore not a UOOM. Assuming *arguendo* the Department considers the second option to be a UOOM, the Department should still reject such an option because it is prohibitively expensive for many consumers. The Department should not adopt the costly Opt-Out Machine model when more well-established free or low-cost mechanisms already exist on the market, particularly when those lower cost models provide consumers with a more fully effectuated opt-out. Especially when considered along with its technical specification shortcomings and notice failures, the Opt-Out Machine’s lack of commercial acceptance and high consumer cost counsel against approving the proposed UOOM.

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Thank you for the opportunity to submit comments on this important topic. Please do not hesitate to contact us with questions regarding this submission.

Sincerely,

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²⁷ 4 C.C.R. 903-4, Rule 5.07(D)(2).