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Honorable Bill Lockyer
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Honorable Christine O. Gregoire
Attorney General of Washington
Office of the Attorney General
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Re: Draft "NAAG Privacy Principles and Background"

Dear Bill and Chris:

The December 11, 2000, draft titled "NAAG Privacy Principles and Background" convinces me that the organization is not ready to take a position on these public policy issues. The draft is short on facts – other than the peculiar and often unreliable "facts" generated by public opinion polls. Before NAAG enters this particular arena, arguing for "federal privacy legislation" (p. 1) and other public policies, it is essential to have a firm grasp of the technical and commercial aspects of the business behavior under review. Judging from the draft, I would say that the NAAG Internet Law Project has much work ahead before it can claim to have such a grasp.

The Hippocratic oath commands physicians, "First, do no harm." This admonition is equally good advice for legislators and, yes, attorneys general. So that NAAG's proposals do not produce more harm than good, the first order of business should be a thorough assessment of the costs and benefits of the information-gathering techniques that federal privacy legislation would likely address. The December 11 draft briefly acknowledges that business use of internet-generated information about consumers has benefited consumers greatly by facilitating the development of increasingly sophisticated direct marketing techniques. The draft notes that, according to a 1998 poll, "63 percent of Americans purchased products or services from targeted mail offers" and that "[m]any want customized marketing that is possible only through compilation and analysis of consumer information data." (p. 2) The draft goes on to state that "thousands of enterprising entrepreneurs" have taken advantage of this new technology. (p. 2)

The draft's recognition of the benefits to consumers from businesses' use of internet-generated information takes up less than half a page of the 11-page document. The positive case for internet-generated information, however, is followed by a confusing paragraph in which the "flip side" is described as follows: "businesses . . . build large, sophisticated databases that are chock-full of customer information that helps them to effectively target and expand the market for the products and services they provide." This alleged negative side is the same as the positive side of the coin! Which is it, then?

The rest of the document is largely given over to a parade of horribles and worst-case scenarios and polling data which suggest that the public has some concerns about privacy and the internet. In fact, the polling data appear to form the backbone of the draft's policy recommendations.

Reliance on vague public opinion data in this context is inappropriate for chief legal officers. People may well harbor vague fears of loss of privacy, but unless the questions asked by the pollsters are carefully phrased, I would expect the public's response to questions about privacy would be skewed significantly in the direction of "more protection, please." Any reasonable person, asked in the abstract if they would like more or less protection of a good thing (such as privacy), can be depended on to answer, "More, please." This response tells us next to nothing that is useful, because the person has not been asked to consider the costs associated with the increased protection. The better question would be to ask if a person would prefer more privacy if it meant that he would receive fewer individually-tailored offers for goods and services from sellers who could no longer use information on that person's buying habits. This balanced presentation would prompt the respondent to consider both the costs and benefits of the position he espouses. I would be disappointed to see NAAG make public statements based upon the public's vague fear of internet technology that would have the effect of fanning those fears. NAAG should take care not to give credence to H.L. Mencken's view that "The whole aim of practical politics is to keep the populace alarmed – and hence clamorous to be led to safety – by menacing it with an endless series of hobgoblins, all of them imaginary."

The draft takes a position on the choice between "opt-in" and "opt-out" privacy policies – the issue that seems to be the most hard-fought one in the current debate. As you know, an opt-in approach "would require Internet companies to ask people for permission to use their personal information" (p. 3), while an opt-out approach would permit the use of personal information unless a person asks that his or her information not be so used. Although privacy advocates prefer opt-in, businesses argue that it entails much higher costs than opt-out and would have a highly negative effect on direct marketing as a result. The opt-out approach was adopted by Congress with respect to financial institutions in the 1999 Gramm-Leach-Bliley legislation.

The draft strongly favors the opt-in approach, but fails to make a convincing case. The draft's rejection of the opt-out approach appears to be based in substantial part on polling data -- i.e., the claim that "96 percent of all Internet users favor 'opt-in' privacy

policies" (p. 3). The draft also offers a strained legal argument – that opt-out rules amount to equating silence with consent, and thus are "inconsistent with 600 years of contract law tenets." (p. 9). Clearly, notice to the consumer and provision of an opportunity to opt-out constitute substantially more than "equating silence with consent."

The draft ignores a substantial legal argument that many privacy restrictions may violate the first amendment. I urge you to review an article published last year, in the Stanford Law Review, on this issue. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 Stan. L. Rev. 1049 (2000). As officers sworn to uphold the Constitution, we have an obligation to consider this important issue.

More fundamentally, the draft misstates the law of privacy. Despite the brilliance of Justice Brandeis's phrase, there is no general "right to be let alone." Although some constitutional or common law provisions protect one aspect of privacy or another, there is no general "right to privacy." In fact, this lack of a right to privacy was Brandeis's concern in his 1890 law review article, dealing with the tell-all newspapers of the day, in which he first used the phrase "right to be let alone."[1] His use of the phrase many years later in his dissent in *Olmstead v. United States* was in the context of governmental invasion of privacy via wiretapping. The Founders "conferred, *as against the government*, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion *by the government* upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added).

In the words of one scholar, "When Brandeis penned his dissent in Olmstead, the enemy for Brandeis was no longer the press, but the government."[2] There is more than a little irony in the draft's invocation of Brandeis in favor of a significant increase in federal regulatory authority over the internet. In a similarly ironic vein, it should also be noted that several federal departments and agencies have recently been faulted for their failures to honor and protect the privacy of internet surfers who visited their websites. The NAAG draft, however, ignores the threat of misuse of private information by government agencies.

In short, the draft has not made the case for government intervention in the free market on the question of internet privacy. I cannot say today that such a case cannot be made, only that I am not persuaded by what has been done to date. I strongly recommend

[1] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).
[2] Mary Murphy Schroeder, *The Brandeis Legacy*, 37 San Diego L. Rev. 711, 720 (2000).

that NAAG not take a public position on this issue until there has been a more thorough assessment of the benefits as well as the costs to consumers of the new uses of internet-generated information, as well as a more thorough assessment of the costs to consumers of any remedy NAAG desires to propose to Congress.

Sincerely,

Bill

Bill Pryor

cc: All state attorneys general
Christine Milliken, NAAG