

IAB MULTI-STATE PRIVACY AGREEMENT: COMMERCIAL CONTRACT ATTORNEYS' GUIDE TO FIRST PARTIES' OBLIGATIONS

This document provides a brief summary of the rights and obligations of publishers and advertisers under the IAB Privacy, LLC's ("IAB") Multi-State Privacy Agreement (the "MSPA"). It is not intended to be, and should not be construed as, legal advice. You are encouraged to read the entire MSPA and obtain legal advice from your attorneys. Any capitalized terms not defined herein shall have the meaning set forth in the MSPA.

What is the MSPA and How Does It Interrelate With Existing Commercial Agreements?

The MSPA is an industry contractual framework intended to aid Advertisers, Publishers, agencies, and ad-tech intermediaries in complying with five state privacy laws that will become effective in 2023 (*i.e.*, California, Virginia, Colorado, Connecticut, and Utah, which are collectively known as "**Applicable Jurisdictions**" in the MSPA). The MSPA is not a model contract or a template agreement; instead, it is a set of privacy-protective terms that spring into place among a network of Signatories and that follow the data as it flows through the digital ad supply chain.

The MSPA does not contain any commercial terms, but instead supplements any existing commercial contracts amongst Signatories (called "**Underlying Agreements**" in the MSPA) with privacy terms that facilitate compliance with privacy laws in the Applicable Jurisdictions; and where no Underlying Agreement exists, the MSPA provides the baseline set of privacy terms required by law. Section 2.2 of the MSPA mandates that in the event of any conflict between an Underlying Agreement and the MSPA, the Underlying Agreement shall govern, except with respect to terms relating to the Processing of Personal Information, in which case the MSPA shall govern.

How Do Publishers and Advertisers Sign the MSPA and What Happens If They Do?

Companies will be able to register and sign up to the MSPA through a streamlined, online interface, which will be available at <https://tools.iabtechlab.com/mspa> as of December 1, 2022. Companies do not need to be members of any IAB entity to sign the MSPA.

Although Publishers and Advertisers (*i.e.*, "**First Parties**"¹) that sign the MSPA can use it to cover all of their digital Ad transactions when they operate as First Parties, they are not required to do so. Rather, when a transaction involves the Processing of Personal Information

¹ The MSPA defines a "First Party" as a Signatory to the MSPA with which a User intentionally interacts in connection with a Covered Transaction. For purposes of this document, we refer to a "First Party" as either the applicable Publisher or Advertiser.

(excluding, however, Sensitive Personal Information),² First Parties have complete discretion as to whether they want the MSPA to apply. If a First Party desires the MSPA to apply, it will – through a technical Signal created by IAB Technology Laboratory, Inc. (“**IAB Tech Lab**”) – designate the transaction as a “**Covered Transaction**,” in which case all Participants in that transaction (other than in certain limited cases)³ must also be Signatories.

If a First Party elects to use the MSPA for a particular Covered Transaction, it must then – again, through a technical Signal created by IAB Tech Lab – elect one of two modes in which to operate with respect to that Covered Transaction (1) “**Opt-Out Option Mode**,” or (2) “**Service Provider Mode**.”

The election of the mode depends on what the First Party seeks to do with the Personal Information that is being Processed under that Covered Transaction. If a First Party desires to “**Sell**” or “**Share**” Personal Information or engage in “**Targeted Advertising**,” it will select Opt-Out Option Mode, in which case it must provide Consumers with certain Opt-Out rights described below. If instead, a First Party wants to engage in a Covered Transaction only with Signatories acting as “**Service Providers**” (*i.e.*, not otherwise Sell or Share Personal Information or engage in Targeted Advertising), it will elect to operate in Service Provider Mode.

In addition to selecting the mode for the Covered Transaction, Section 3 of the MSPA requires the First Party to determine the Applicable Jurisdiction whose privacy law governs the Processing of Personal Information of a given Consumer. Here, the First Party has a choice. It can use commercially reasonable efforts to determine the state residency of the Consumer to determine the Applicable State Privacy Law and comply with such state’s specific requirements. Or, if the First Party is not able to make such a determination or does not wish to provide different (and sometimes less stringent) privacy choices to different users, it can process the Consumer’s Personal Information using the “**National Approach**” as defined and articulated in the MSPA. On the other hand, if a First Party determines a Consumer is not a resident of an Applicable Jurisdiction, it is always free to forego processing digital Ad transactions for that Consumer as Covered Transactions.

What are the Technical and Operational Obligations of Publishers and Advertisers Under Covered Transactions?

The obligations of First Parties under the MSPA depend on the mode and regulatory path (*i.e.*, state-specific versus the National Approach) selected by the First Party.

² The MSPA in its current form is not intended to support the processing of Sensitive Personal Information. The MSPA does not prevent Signatories from Processing Sensitive Personal Information, but any such Processing cannot be undertaken as part of a Covered Transaction. The IAB may develop an optional addendum that will provide terms for Processing Sensitive Personal Information (for example, precise geolocation information) as part of Covered Transactions. Signatories that do not wish to Process Sensitive Personal Information with respect to Covered Transactions would not be required to sign such an addendum.

³ Under the MSPA, a “Subprovider” that acts purely as a Service Provider or Processor for a Signatory (for example, a cloud hosting service) is not required to be Signatory in order to assist that Signatory with a Covered Transaction.

Obligations of Publishers and Advertisers that Select Opt-Out Option Mode

A First Party's obligations under Opt-Out Option Mode are set forth in Section 4 of the MSPA. Below is a brief summary of these obligations.

- Section 4.1 (General Obligations) – If a First Party elects to operate in Opt-Out Option Mode, it must do so for Sales, Sharing, or Targeted Advertising, as applicable (for example, depending on whether an Applicable State Privacy Law requires an Opt Out of Targeted Advertising).
- Section 4.2 (Notice) – if the First Party elects the state-specific route, it must comply with the notice requirements of the Applicable State Privacy Law. If the First Party elects the National Approach, it must provide notice as if the Consumer were a resident of each Applicable Jurisdiction.
- Section 4.3 (Choice Mechanisms) – if the First Party elects the state-specific route, it must: (1) include certain mechanisms on its Digital Property that enable the Consumer to exercise rights granted by Applicable State Privacy Laws as to the permitted Processing of his or her Personal Information (defined as “**Choice Mechanisms**” in the MSPA); and (2) comply with certain Opt-Out requirements, in each case as required by the MSPA to satisfy the laws of the Applicable Jurisdiction. If the First Party elects the National Approach, it must include the Choice Mechanisms and comply with the Opt-Out requirements as if the Consumer were a resident of each Applicable Jurisdiction.
- Section 4.4 (Permitted Processing) – this Section requires the First Party to honor the choices made by Consumers using the applicable Choice Mechanisms set forth in Section 4.3 and sets forth the manner in which the First Party must comply.
- Section 4.5 (Signals) – this Section requires First Parties to comply with the requirements to set and send Signals as set forth in the Technical Signaling Implementation Guidelines, which are to be promulgated prior to the release of the MSPA.
- Section 4.6 (Conflicts) – if the First Party receives outputs from the Choice Mechanisms that result in conflicting outcomes as to the First Party's Processing of a Consumer's Personal Information, the First Party shall honor the Consumer's choice that results in the more limited Processing of that Consumer's Personal Information.

Obligations of Publishers and Advertisers Service Provider Mode

A First Party's obligations under Service Provider Mode are set forth in Section 5 of the MSPA. Below is a brief summary of these obligations.

- Section 5.1 (Notice) – if the First Party elects the state-specific route, it must comply with the notice requirements of the Applicable State Privacy Law. If the First Party elects the National Approach, it must provide notice as if the Consumer were a resident of each Applicable Jurisdiction.

- Section 5.2 (Processing Personal Information in a Manner That is Unrelated to, or Incompatible With, the Purpose for Which It Was Initially Collected) – although First Parties operating in Service Provider Mode are not required to provide Consumers with Choice Mechanisms for Sales, Sharing, or Targeted Advertising (because the First Party does not engage in those activities), if the First Party elects to Process Personal Information in a manner that is unrelated to, or incompatible with, the purpose for which it was initially collected, and the First Party has determined the Consumer is a resident of California or has elected to use the National Approach with respect to such Covered Transaction, the First Party still must comply with several restrictions and obligations related to its provision of Choice Mechanisms and permitted Processing, in each case as set forth in Section 1.1 of Schedule C of the MSPA. This requirement relates to specific requirements in the CCPA’s implementing regulations, to the extent they apply.
- Section 5.3 (Signals) – this Section requires First Parties to comply with the requirements to set and send Signals as set forth in the Technical Signaling Implementation Guidelines.
- Section 5.4 (Designation of Service Providers) – by operating in Service Provider Mode and setting the corresponding Signals in accordance with Section 5.3 of the MSPA, the First Party designates the other Signatories Processing Personal Information in connection with the Covered Transaction as its Service Providers.

What are the General Legal Obligations of Publishers and Advertisers Under the MSPA?

Although the obligations and restrictions imposed by the MSPA are primarily technical and operational in nature, there are several legal terms worth noting.

- Section 10 – Term. With respect to a particular First Party, the term of the MSPA commences when it accepts the MSPA and continues until termination by IAB or the First Party is removed or withdraws. First Parties can withdraw from the MSPA at any time on thirty (30) days written notice to IAB.
- Section 11 – Representations, Warranties, and Covenants. First Parties represent, warrant, and covenant, among other things, that they will comply with all Applicable State Privacy Laws. First Parties also represent, warrant, and covenant that: (1) with respect to any Covered Transaction for which it has sent a Signal, it is a Controller for such transaction; and (2) with respect to a Covered Transaction pertaining to a Consumer whom a First Party has determined is a resident of California or elected to treat as a National Consumer, if the First Party has entered into an Underlying Agreement pertaining to the Covered Transaction and such Underlying Agreement does not adhere to all of the requirements set forth in Cal. Civ. Code § 1798.100(d), the First Party and the counterparty to the Covered Transaction agree to certain additional obligations and restrictions as necessary to effectuate compliance with those requirements; and similarly, if the First Party has not entered into any such Underlying Agreement with respect to a Covered Transaction (*i.e.*, a “**Gap Transaction**”), the First party and counterparty to such Covered Transaction agree to certain additional

obligations and restrictions as necessary to effectuate compliance with all of the requirements set forth in Cal. Civ. Code § 1798.100(d).

- Section 12 – Limitation of Liability. No money damages may be awarded under the MSPA; any money damages to which a First Party may be entitled must be recovered under an Underlying Agreement or some other means. First Parties may seek injunctive relief under the MSPA, however.
- Section 13 – Indemnification. Each First Party agrees to defend, indemnify, and hold harmless IAB, IAB Tech Lab, and Interactive Advertising Bureau, Inc. in connection with third-party claims arising from such First Party's breach of the MSPA. It is important to emphasize that First Parties do not indemnify each other under the MSPA.
- Section 14 – Choice of Law and Forum. New York.