

December 6, 2023

California Privacy Protection Agency  
2101 Arena Boulevard  
Sacramento, CA 95834

**RE: Joint Ad Trade Letter – Initial Comments on Draft Automated Decisionmaking Technology Regulations**

Dear California Privacy Protection Agency:

On behalf of the advertising industry, we provide this initial set of comments on the California Privacy Protection Agency's ("CPPA") draft automated decisionmaking technology ("ADT") regulations in advance of the December 8, 2023 public meeting of the CPPA board.<sup>1</sup> We and the companies we represent, many of whom do substantial business in California, strongly believe consumers deserve meaningful privacy protections supported by reasonable laws and responsible industry policies. We provide these initial, non-exhaustive comments with the goal of streamlining the draft ADT regulations so the CPPA can receive helpful, pointed, and deliberative input throughout the regulatory process. We will provide comments on the proposed updates to the regulations to implement the California Consumer Privacy Act ("CCPA"), in addition to other regulatory proposals set forth by the agency, at a later date. We thank you for the opportunity to participate in this regulatory exercise.

We are concerned that the draft ADT rules would impede even the most basic and benign data processing functions, including processing that is routine and unlikely to cause consumers harm or negative impacts. Moreover, as presently drafted, the rules are too vague, broad, and imprecise to elicit meaningful feedback from stakeholders to inform the regulatory process. We therefore ask the CPPA to update the draft ADT rules so they offer more precision and clarity and so they apply only to automated processing activities that produce legal or similarly significant effects concerning a consumer before formally issuing the draft ADT rules to the public for comment.

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.<sup>2</sup> By one estimate, over 1.1 million jobs in California are related to the ad-subsidized Internet.<sup>3</sup> We would welcome the opportunity to engage with you further on the non-exhaustive list of issues with the draft ADT regulations that we outline here.

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<sup>1</sup> California Privacy Protection Agency, *Draft Automated Decisionmaking Technology Regulations (December 2023)*, located [here](#) (hereinafter, "Draft ADT Rules"); see also California Privacy Protection Agency Board, *Meeting Notice & Agenda for December 8, 2023 Public Meeting*, located [here](#).

<sup>2</sup> John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located [here](#).

<sup>3</sup> *Id.* at 121-23.

## **I. The Draft ADT Regulations Are Overly Broad and Out-Of-Step With ADT Regulations in Other Jurisdictions**

The CPPA’s proposed definition for the term ADT is drafted so broadly that it could encompass any and all kinds of automated processing activity. The draft rules’ definition of ADT would include “any system, software, or process... that processes personal information and uses computation... to make or execute a decision or facilitate human decisionmaking.”<sup>4</sup> This proposed definition would encompass virtually all essential data processing practices that are imperative for the functioning of the modern economy. Permitting consumers to opt out of this overly broad formulation of ADT could impact even the most basic of automated activities that benefit consumers, resulting in significant inefficiencies and higher costs for consumers. While the draft rules set forth certain exceptions to the proposed ADT opt out, the breadth of the ADT definition and the lack of specificity in the exemptions creates the possibility of extraordinarily broad and likely unintended impacts.

In addition, the scope of the proposed ADT regulations is significantly out-of-step with other jurisdictions’ approaches to automated processing. Other states permit consumers to opt out of *solely* automated processing decisions that produce *legal or similarly significant effects concerning a consumer*.<sup>5</sup> California, by contrast, would apply opt out requirements to all forms of ADT—even those that contain meaningful human oversight and processing activities that have no potential to impose legal or other important impacts on Californians. Even Europe’s General Data Protection Regulation (“GDPR”) proposes a more narrow concept of ADT, as the GDPR limits its definition of automated processing to fully automated-decisionmaking without human intervention.<sup>6</sup> Including all decisions that “facilitate” human decisionmaking in California’s definition of ADT, and applying ADT opt outs to *all* automated processing, would stymie the development and use of basic tools and data processing functions that create convenience, efficiencies, and benefits for consumers. The potential breadth of California’s approach to ADT would extend far beyond the approach to such processing taken in other jurisdictions and would lead to potential loss of innovative products and services for California consumers. To minimize unintended results for Californians and foster consistency with other jurisdictions, we encourage the CPPA to narrow the scope of the draft ADT regulations to automated processing functions that produce legal or similarly significant effects concerning a consumer before formally issuing them for comment.

## **II. The Draft ADT Rules Are Too Vague to Elicit Meaningful Feedback**

The vague and unclear draft ADT rules leave parties interested in providing meaningful comments to the CPPA with insufficient information to analyze and address with the agency. The proposal to create a right to opt out of use of ADT for “profiling a consumer for behavioral advertising,” for example, is both unclear and confusing.<sup>7</sup> The draft ADT rules provide no definition for the term “behavioral advertising,” giving interested commenters no reasonable way to interpret or understand this proposed new opt out right. It is also not clear how this proposed right and new term interplay with existing rights or terms under the CCPA. For example, the draft ADT rules do not make use of the available statutorily defined terms of “cross-context behavioral advertising,” “sale,” “sharing,” or “advertising and marketing,” instead opting to use the undefined term of “behavioral

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<sup>4</sup> Draft ADT Rules at § 7001.

<sup>5</sup> See, e.g., Va. Code Ann. § 59.1-577(A)(5); Colo. Rev. Stat. § 6-1-1306(a)(I)(C); Conn. Gen. Stat. § 42-518(a)(5).

<sup>6</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, Art. 22.

<sup>7</sup> Draft ADT Rules at § 7030(b)(4).

advertising” and creating significant confusion as to exactly what activity it is that the CPPA proposes to regulate.<sup>8</sup>

The CCPA already provides consumers with the ability to opt out of “sales” and “sharing”—terms that cover (1) transfers of personal information to third parties for monetary or other valuable consideration and (2) the targeting of advertising to a consumer based on personal information obtained across distinct businesses, respectively.<sup>9</sup> The law exempts transfers of personal information to service providers and contractors from the scope of sale and provides no other opt out rights for various other advertising activities acknowledged and contemplated under the law, such as general “advertising and marketing.” The CCPA, and its opt out rights related to advertising, were not drafted to provide an opt out right from all potential advertising functionality. Instead, the law specifically provides an opt out for transfers of personal information in exchange for monetary or other valuable consideration and the targeting of advertising based on information obtained *across* businesses. The draft ADT regulations’ proposed opt out for behavioral advertising is thus sufficiently unclear, as the text of the CCPA itself already provides opt outs related to targeting advertisements and sales of data to third parties. Thus, it is unclear what activity the CPPA would seek to regulate here and under which basis it intends to do so. The CPPA should remove the proposed opt out for behavioral advertising from the draft ADT rules and take steps to ensure its ADT regulations reflect the text and intent of the CCPA itself.

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We and our members support protecting consumer privacy, and we look forward to providing helpful feedback on the content of the CPPA’s ADT rules in addition to feedback on the agency’s various other rulemaking updates and proposals. We encourage the CPPA to narrow the scope of the ADT opt out to align it with other jurisdictions and clearly describe how the proposed ADT opt out differs from other rights under the CCPA before formally releasing the draft ADT rules for comment. We would welcome the opportunity to engage with you further on the content of the draft ADT rules.

Sincerely,

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<sup>8</sup> See Cal. Civ. Code §§ 1798.140(a), (k), (ad), (ah).

<sup>9</sup> *Id.* at §§ 1798.120, 140(ad), (ah).