

October 19, 2022

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RE: Joint Ad Trade Comments on the CPPA’s Proposed Consent Agenda to Resolve “Non-Controversial” Issues in the CPRA Rulemaking Process

Dear California Privacy Protection Agency Board Members and Executive Director Ashkan Soltani:

On behalf of the advertising industry, we respectfully urge the California Privacy Protection Agency (“CPPA” or “Agency”) to decline to consider or approve certain controversial regulatory provisions through a “consent agenda” process to expedite the proposed regulations implementing the California Privacy Rights Act of 2020 (“CPRA”). During the CPPA’s September 23 meeting, the Agency expressed interest in placing certain regulatory provisions on a consent agenda for “non-controversial” issues. Shortly thereafter, the Agency published modified proposed regulations to implement the CPRA.¹ There are several issues in the modified proposed regulations that are controversial and unsettled, and therefore should not qualify for any potential consent agenda. Specifically, the following two areas are particularly in need of further discussion and consideration, as they were not addressed by the modifications to the proposed regulations and remain controversial:

- I. Proposed regulations related to opt-out preference signals are missing statutorily mandated safeguards; and
- II. Consumer notice should fulfill the CPRA’s “necessary and proportionate” requirements rather than tying “necessary and proportionate” processing requirements to “average” or “reasonable” consumer expectations.

As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country and in California. These companies range

¹ CPPA, *Modified Text of Proposed Regulations*, located [here](#).

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 2020.² Our group has more than a decade’s worth of hands-on experience relating to matters involving consumer privacy and controls. 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 have participated in every proceeding under this CPRA rulemaking, including filing comments in response to the initial draft of proposed regulations. We welcome the opportunity to continue to engage with you to develop regulations to implement the CPRA.

I. The Issue of Opt-Out Preference Signals Is Unfit for a Potential Consent Agenda Given Outstanding and Unaddressed Statutorily Required Safeguards

As the current proposed regulations do not address important statutory safeguards for opt-out preference signals that the CPRA requires, the issue of opt-out preference signals remains controversial and should not be summarily settled via consent agenda consideration. Under the CPRA, the Agency *must* promulgate specific rules to define the scope and form of opt-out preference signals. Specifically, the regulations must “define the requirements and technical specifications for an opt-out preference signal . . . The requirements and specifications for the opt-out preference signal should be updated from time to time to reflect the means by which consumers interact with businesses, and should” ensure the signal meets several safeguards: (1) avoids unfairly disadvantaging certain businesses or business models over others in the ecosystem, (2) is clearly described; (3) clearly represents a consumer’s intent and does not employ defaults that presuppose such intent; (4) does not conflict with commonly-used privacy settings consumers may employ; (5) provides a mechanism for consumers to consent to sales or sharing without affecting their preferences with respect to other businesses; and (6) provides granular opt-out options for consumers.³

The statute requires CPRA implementing regulations to include such safeguards while “considering the legitimate operational interests of businesses.”⁴ However, such technical specifications and safeguards appear nowhere in the current proposed regulations.⁵ If the Agency has not resolved where it stands on these statutorily mandated details or made them available for review by interested parties, the issue of opt-out preference signals cannot fairly be considered undisputed or proper for a consent agenda.

The lack of clarity about opt-out preference signals is further exacerbated by a possible truncated window between finalized CPRA implementing regulations and their enforcement date. The CPRA tasks the Agency with finalizing the regulations implementing the law by July 1, 2022, but unfortunately this deadline passed without the Agency issuing final regulations.⁶ Yet,

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

³ Cal. Civ. Code § 1798.185(a)(19)(A) (effective Jan. 1, 2023).

⁴ *Id.* at § 1798.185(a)(19)(C).

⁵ *See, e.g.*, Cal. Code Regs. tit. 11, § 7025 (proposed).

⁶ Cal. Civ. Code § 1798.185(d) (effective Jan. 1, 2023).

enforcement of the CPRA regulations could begin on July 1, 2023.⁷ Such an enforcement timeline would grant businesses less than the statutorily intended one-year period to bring themselves into compliance with new regulatory provisions, including provisions on the novel and technically complex subject of opt-out preference signals. The lingering ambiguity surrounding these signals, coupled with a potentially shortened enforcement window, highlights the importance of the statute’s intent that the Agency first promulgate proposed regulations that address all statutorily required terms before mandating that businesses comply.

II. The Proposed Regulations Overlook the CPRA’s Recognition of Consumer Notice as a Valid Basis for Data Use, Presenting a Significant Dispute

The CPRA sets out permissible business purposes for data use *and expressly* states personal information may be used for “other notified purposes.”⁸ Despite this statutory text, the proposed regulations introduce an “average” or “reasonable” consumer expectation standard that would make consumer notice obsolete under the statute.⁹ The disharmony between the statutory text of the CPRA and well-established consumer privacy principles and what the proposed rules set forth underscores the importance of addressing this issue completely in regular order and not via a consent agenda. The issue deserves a thorough discussion of the benefits of permitting businesses’ data use consistent with their notices to consumers, as well as an explanation of the Agency’s perceived authority to contravene a standard stated clearly in the text of the CPRA itself.

III. Conclusion

We and our members strongly support protecting consumer choice and privacy and preserving responsible data use by commercial businesses operating in California. Given the discussion during the Agency’s September 23 meeting, we urge you to refrain from considering the matters we have mentioned above during any condensed consent agenda process. We will continue to raise these and other critical points in future comments to the CPPA so they may hopefully help to facilitate the CCPA’s rulemaking proceedings. Again, we thank you for the opportunity to participate in the CPRA rulemaking process.

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⁷ *Id.*

⁸ “A business’s collection, use, retention, and sharing of a consumer’s personal information shall be reasonably necessary and proportionate to achieve the purposes for which the personal information was collected or processed, *or for another disclosed purpose* that is compatible with the context in which the personal information was collected, and not further processed in a manner that is incompatible with those purposes.” *Id.* at §§ 1798.100(c), 140(e).

⁹ The proposed regulations would require “a business’s collection, use, retention, and/or sharing” of personal information to be “reasonably necessary and proportionate to achieve... the purpose(s) for which the personal information was collected or processed... [or] another disclosed purpose that is compatible with the context in which the personal information was collected...” Cal. Code Regs. tit. 11, § 7002(a) (proposed). Both permitted uses of personal information require a consideration of average or “reasonable” consumer expectations. *Id.* at §§ 7002(b); (c)(1).

Thank you in advance for consideration of this letter.

Sincerely,

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