August 23, 2022

California Privacy Protection Agency
Attn: Brian Soublet
2101 Arena Blvd.
Sacramento, CA 95834

RE: Joint Ad Trade Comments on the Text of Proposed Regulations to Implement the California Privacy Rights Act of 2020 – CPPA Public Comment

Dear Privacy Regulations Coordinator:

On behalf of the advertising industry, we provide the following comments in response to the California Privacy Protection Agency's ("CPPA" or "Agency") July 8, 2022 request for public comment on the text of proposed regulations to implement the California Privacy Rights Act of 2020 ("CPRA").[1] 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. However, we are concerned that several provisions in the proposed regulations contravene the clear text of the CPRA. We also believe that the Agency has seriously underestimated the costs that will accrue from the new, and in some cases, unclear requirements set forth in the proposed rules.[2] We therefore ask the CPPA to amend the proposed regulations to ensure that they align more clearly with the text of the CPRA, as described in more detail in the comments that follow below. We also ask the Agency to amend its Economic and Fiscal Impact Statement so that it more accurately reflects the significant costs that businesses will accrue from required updates to their processes and procedures to comply with new mandates under the proposed regulations.

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.[3] Our group has more than a decade's worth of hands-on experience it can bring to bear on matters related to consumer privacy and controls. We welcome the opportunity to engage with you in this process to develop regulations to implement the CPRA.

I. The Proposed Regulations' "Necessary and Proportionate" Requirements Should Be Tied to Consumer Notice

The CPRA enumerates specific business purposes for which a business may use personal information *and explicitly* states personal information may be used for "other notified purposes."[4] The proposed regulations' "average consumer expectation" standard would completely read out of the statute the role notice plays under the CPRA in permitting the collection and use of personal

[1] CPPA, *Notice of Proposed Rulemaking* (Jul. 8, 2022), located here.
[2] CPPA, *Economic and Fiscal Impact Statement (STD 399)* (Jun. 28, 2022), located here.
[3] 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").
[4] Cal. Civ. Code §§ 1798.100(c), 140(e) (effective Jan. 1, 2023).

information. The proposed regulations should be modified to recognize that a business may use data as described in its privacy notices to consumers, including uses that are consistent and compatible with its disclosures.

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. To be reasonably necessary and proportionate, the business's collection, use, retention, and/or sharing must be consistent with what an *average consumer would expect* when the personal information was collected."[5] This "average consumer expectation" standard is not the standard set forth for "necessary and proportionate" data processing requirements in the law. The CPRA itself ties its "necessary and proportionate" requirements to consumer notice, not to average consumer expectations.[6] The law states: "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."[7] Similarly, the CPRA's definition of "business purpose" is "the use of personal information for the business's operational purposes, or other notified purposes…."[8] The law thus clearly ties permissible data collection and use to disclosures, not average consumer expectations.

The proposed regulations substitute a new and entirely different standard in place for a clear standard set forth in the CPRA, thereby contravening statutory intent. The illustrative examples provided in proposed Section 7002 illustrate how this standard, in application, would create a result that would contravene the operational requirements of the CPRA. For example, one illustrative example would prohibit an Internet service provider from transferring any kind of geolocation information to data companies absent explicit consent from the consumer, when the text of the CPRA would permit such sales or transfers if that activity is disclosed in a consumer notice.[9] Similarly, the illustrative examples would prohibit online retailers from using their own customers' information to market other businesses' products without the customer's consent, even if a customer is made aware of that marketing data use because it is in the business's privacy policy.[10] The illustrative examples in Section 7002 contradict the consumer disclosure approach to necessary and proportionate data use taken in the CPRA. The CPPA should therefore update the proposed regulations so the requirement for "necessary and proportionate" collection, use, retention, and/or sharing is based on what is disclosed in notices to consumers rather than a malleable and fluid "average consumer expectation."

II. The Proposed Regulations Should Follow the CPRA by Clarifying Opt-Out Preference Signals Are Optional and Should Implement Statutorily Required Safeguards to Authenticate Such Signals

The CPRA clearly states that businesses "may elect" to comply with opt out preference signals or include a clearly labeled opt-out link in the footer of their websites.[11] The proposed rules contradict this statutory language by stating that processing such signals is mandatory.[12] The proposed rules read

[5] Cal. Code Regs. tit. 11, § 7002(a) (proposed).
[6] Cal. Civ. Code § 1798.100(c) (effective Jan. 1, 2023).
[7] *Id*. (emphasis added).
[8] *Id.* at § 1798.140(e).
[9] Cal. Code Regs. tit. 11, § 7002(b)(3) (proposed).
[10] *Id.* at § 7002(b)(4).
[11] Cal. Civ. Code § 1798.135(b)(3) (effective Jan. 1, 2023).
[12] Cal. Code Regs. tit. 11, §§ 7025(b), (e) (proposed).

out of the text of the law clear language that makes opt-out preference signals optional. Instead, the proposed rules suggest that a business is mandated to honor opt out preference signals in either a "frictionless" or "non-frictionless manner," terms that are nowhere in the text of the CPRA itself.[13] The proposed regulations' "frictionless" standard is extra-legal, as it is not supported by the text of the CPRA; it directly contravenes the law, which clearly makes adherence to opt out preference signals optional.

To support the proposed regulation making adherence to opt out preference signals mandatory, the Agency's Initial Statement of Reasons ("ISOR") for the proposed rules cites the regulatory authority given to the Agency in Section 1798.185(a)(20) of the CPRA. According to the ISOR, adherence to opt out preference signals is mandatory because the statute gives the Agency authority to issue rules to govern how a business may provide consumers with an opportunity to subsequently consent to sales or sharing of personal information. This reasoning does not describe why the Agency has gone beyond the plain text of the law by instituting a mandatory standard instead of the clear choice the CPRA envisions with respect to such signals. Moreover, it entirely ignores the fact that the regulatory directive in Section 1785.185(a)(20) itself even acknowledges that adherence to opt-out preference signals is optional. According to that section, the Agency must issue "regulations to govern how a business ***that has elected*** to comply with subdivision (b) of Section 1798.135," the subdivision that describes opt-out preference signals, "responds to the opt-out preference signal."[14] By making adherence to opt-out preference signals mandatory, the Agency has ignored clear text to the contrary in the CPRA. The Agency should rewrite its opt-out preference signal regulations to reflect the CPRA's text, which explicitly gives businesses a choice to process such signals ***or*** offer a clearly labeled opt-out link in the footers of their websites.

Additionally, the Agency's proposed opt-out preference signal rules fail to implement key provisions of the CPRA that set guardrails around the development of the optional opt-out preference signals. The CPRA specifically tasks the Agency with "issuing regulations to define the requirements and technical specifications for an opt-out preference signal," which would ensure the signal: (1) cannot unfairly disadvantage certain businesses in the ecosystem, (2) is clearly described; (3) clearly represents a consumer's intent and is free of defaults presupposing 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. Not one of these key safeguards—which are explicitly in the text of the CPRA and which the Agency is instructed to effectuate via regulations—is addressed in the proposed rules.

As written, the proposed regulations would create widespread confusion because they do not clarify how opt-out preference signals can meet the safeguards requirements that are set forth in law. The proposed regulations also do not call for any standardization for opt-out preference signals. The Agency should create a process to address the requirements for opt-out preference signals that reflects the CPRA's stated safeguards, rather than make businesses guess which signals comply with the law's mandates as well as how companies should address conflicting signals with respect to a single individual. Regulations furthering the CPRA's opt-out preference signal safeguards are necessary to ensure businesses can verify that the signal, or the "mechanism" or "tool" that provides the signal, has complied with the various requirements under the CPRA, including requirements related to presentation of choices, default settings, disadvantages to businesses, and reflection of consumer intent. The Agency should address these statutory requirements concerning mechanisms that set opt-out preference signals before adopting regulations concerning honoring such signals. Guidance is first

[13] *Id*. at § 7025(e).
[14] Cal. Civ. Code § 1798.185(a)(20) (effective Jan. 1, 2023) (emphasis added).

required to govern the mechanisms used to set signals to ensure such tools are offered in compliance with law and so that businesses receiving such signals can be assured that the signals are legally set preferences.

III. Section 7050(c) is Duplicative of the CPRA and Should Be Removed From the Proposed Regulations

Section 7050(c) of the proposed regulations merely restates the CPRA. The section should therefore be removed from the proposed regulations because it provides no additional context or clarity that is not already in the text of the law. The proposed regulation reaffirms the CPRA's text, which prohibits companies from offering cross-context behavioral advertising services to businesses while occupying the "service provider" role.[15] Section 7050(c) of the proposed regulations simply restates the law, which plainly permits entities to provide advertising and marketing services to businesses as "service providers," and even permits them to combine personal information for advertising and marketing purposes in some circumstances so long they do not "combine the personal information of opted-out consumers that the service provider… receives from, or on behalf of, the business with personal information that the service provider receives from, or on behalf of, another person or persons or collects from its own interactions with consumers."[16] The text used in Section 7050(c) of the proposed regulations is virtually identical to the text of the CPRA on this point, and it is also duplicative of the section immediately preceding it, Section 7050(b)(4). Because the proposed regulation restates the CPRA provision explaining that an entity may provide advertising and marketing services as a service provider, but may not engage in cross-context behavioral advertising (the targeting of advertisements to consumers based on personal information combined from multiple businesses),[17] Section 7050(c) adds no additional clarity to the CPRA and should thus be removed from the proposed regulations.

IV. The Proposed Regulations Should Clarify a Third Party's Provision of Information About its Business Practices to a First Party Satisfies the Third Party's "Notice at Collection" Obligations

The proposed regulations place "notice at collection" requirements on entities that "control the collection" of personal information.[18] These entities may include first party entities, which, for example, own the websites that consumers may visit, as well as third party entities that may control collection of personal information about a consumer when he or she visits a first party's website. Section 7012(g)(1) states the first party "as well as the third party controlling the collection of personal information, shall provide a notice at collection."[19] The proposed regulations state that a first party's "notice at collection" must include "the names of all the third parties that the first party allows to collect personal information from the consumer."[20] Alternatively, the proposed regulations permit "a business, acting as a third party and controlling the collection of personal information, [to] provide the first party [with] information about its business practices for the first party to include in the first party's notice at collection."[21] Although the proposed regulations provide this option to third parties, they do not clarify that a third party's provision of information about its business practices to a first party will satisfy the third party's "notice at collection" obligations. The Agency should consequently add a sentence to Section 7012(g)(2) of the proposed regulations to clarify that a third party that provides

[15] *Id.* at § 1798.140(e)(6).
[16] *Id*.
[17] *Id*. at § 1798.140(k).
[18] Cal. Code Regs. tit. 11, § 7012(g)(1) (proposed).
[19] *Id.*
[20] *Id*. at § 7012(g)(2).
[21] *Id.*

information about its business practices to a first party for inclusion in that first party's notice at collection has satisfied the third party's own "notice at collection" obligations.

V. The Proposed Regulations Should Permit Businesses to Leverage Existing In-Market Icons and Choice Mechanisms

According to the CPRA, businesses may offer an "alternative opt-out link" to "provid[e] consumers with a single, clearly-labeled link that enables consumers to easily exercise both their right to opt-out of sale/sharing and right to limit, instead of posting the two separate 'Do Not Sell or Share My Personal Information' and 'Limit the Use of My Sensitive Personal Information' links."[22] The proposed rules would require the title for that link to be "Your Privacy Choices" or "Your California Privacy Choices," and would require it to direct a consumer to a webpage that enables them to make choices to opt out of sales, opt out of sharing, and limit the use and disclosure of sensitive personal information.[23] For entities that use such an "alternative opt-out link," the proposed regulations would require them to also include the following graphic next to the link:

The proposed graphic icon is confusing. Its inclusion of just one check mark and one "x" suggests just *one choice* will be made via the alternative opt-out link, when in reality the link would provide consumers the ability to make three choices: (1) the choice to opt out of personal information sales; (2) the choice to opt out of personal information sharing; and (3) the choice to limit the use and disclosure of sensitive personal information. The CPPA should remove the prescriptive opt-out icon requirement and instead allow the marketplace to continue to leverage existing, widely deployed iconography provided the mandatory language is present.[24]

VI. The Proposed Regulations Should Not Require Opt-Out Requests to Be Sent Downstream

The proposed regulations would require businesses to send opt-out requests to other parties to which the business transferred related personal information.[25] This requirement is not reflected in the CPRA and would not further consumer choice. The CPRA empowers consumers to express choices to businesses individually via a clearly labeled opt-out link, and pursuant to the text of the CPRA, those choices are effective against those businesses alone. A rule requiring businesses to send opt-out requests to other downstream entities actually removes choices from consumers by eliminating their ability to make choices effective against certain businesses while still enjoying the benefit of data use by other companies. Additionally, the requirement to forward opt-out requests to other parties is not present in the text of the CPRA. The CPRA clearly requires businesses to send *deletion* requests to contractors, service providers, and third parties, but the text does not include the same requirements for opt-out requests.[26] The existence of the requirement to forward deletion requests to other parties while the same requirement is absent for opt-out requests shows that the CPRA does not intend to impose an opt-out flow down requirement on businesses. The requirement for businesses to transmit opt-out requests to other parties should be removed from the proposed regulations.

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[22] *Id*. at § 7015(a).
[23] *Id*. at §§ 7015(b) & (c).
[24] Digital Advertising Alliance, *YourAdChoices*, located here.
[25] Cal. Code Regs. tit. 11, §§ 7026(f)(2) & (3) (proposed).
[26] Cal. Civ. Code § 1798.105(c)(1) (effective Jan. 1, 2023).

VII. The Agency Should Delay Enforcement for One Year Following Finalization of the Proposed Regulations

According to the CPRA, the Agency is required to finalize the regulations implementing the law by July 1, 2022.[27] This date has unfortunately already passed, and the regulations implementing the CPRA are not yet final. If the proposed regulations were made final by the statutorily mandated date of July 1, 2022, businesses would have had a full year to come into compliance with the regulations' terms prior to facing enforcement actions from the CPPA, which may commence on July 1, 2023.[28] In alignment with the CPRA timeline, the Agency should delay enforcement actions for one year following the finalization of the regulations implementing the law. Such an enforcement forbearance would sync with the clear language of the CPRA, which was structured to give businesses a full year to modify their practices, as needed, to comply with regulatory requirements before they could be penalized for violating those obligations.

VIII. The Data-Driven and Ad-Supported Online Ecosystem Benefits California Residents and Fuels Economic Growth

Over the past several decades, data-driven advertising has created a platform for innovation and tremendous growth opportunities. A recent study found that the Internet economy's contribution to the United States' GDP grew 22 percent per year since 2016, in a national economy that grows between two to three percent per year.[29] In 2020 alone, it contributed $2.45 trillion to the U.S.'s $21.18 trillion GDP, which marks an eightfold growth from the Internet's contribution to GDP in 2008 of $300 billion.[30] Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet in 2020, 7 million more than four years prior.[31] More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.[32] The same study found that the ad-supported Internet supported 1,096,407 full-time jobs across California, more than double the number of Internet-driven jobs from 2016.[33]

A. Advertising Fuels Economic Growth

Data-driven advertising supports a competitive online marketplace and contributes to tremendous economic growth. Overly restrictive regulations that significantly hinders certain advertising practices, such as third-party tracking, could yield tens of billions of dollars in losses for the U.S. economy—and, importantly, not just in the advertising sector.[34] One recent study found that "[t]he U.S. open web's independent publishers and companies reliant on open web tech would lose between $32 and $39 billion in annual revenue by 2025" if third-party tracking were to end "without mitigation."[35] That same study found that the lost revenue would become absorbed by "walled gardens," or entrenched market players, thereby consolidating power and revenue in a small group of

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[27] *Id.* at § 1798.185(d).
[28] *Id.*
[29] Deighton & Kornfeld 2021 at 5.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 6. *See also* Digital Adverising Alliance, *Summit Snapshot: Data Drives Small-and Mid-sized Business Online, It's Imperative that Regulation not Short-Circuit Consumer Connections* (Aug. 17, 2021), located here.
[33] *Compare* Deighton & Kornfeld 2021. at 121-123 (Oct. 18, 2021), located here *with* John Deighton, Leora Kornfeld, and Marlon Gerra, *Economic Value of the Advertising-Supported Internet Ecosystem,* INTERACTIVE ADVERTISING BUREAU, 106 (2017), located here (finding that Internet employment contributed 478,157 full-time jobs to the California workforce in 2016 and 1,096,407 jobs in 2020).
[34] *See* John Deighton, *The Socioeconomic Impact of Internet Tracking* 4 (Feb. 2020), located here (hereinafter, "Deighton 2020")
[35] *Id.* at 34.

powerful entities.[36] Smaller news and information publishers, multi-genre content publishers, and specialized research and user-generated content would lose more than an estimated $15.5 billion in revenue.[37] Data-driven advertising has thus helped to stratify economic market power and foster competition, ensuring that smaller online publishers can remain competitive with large global technology companies.

B. Advertising Supports Californians' Access to Online Services and Content

In addition to providing economic benefits, data-driven advertising subsidizes the vast and varied free and low-cost content publishers offer consumers through the Internet, including public health announcements, news, and cutting-edge information. Advertising revenue is an important source of funds for digital publishers,[38] and decreased digital advertising budgets directly translate into lost profits for those outlets. Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.[39] And, consumers tell us that. In fact, consumer valued the benefit they receive from digital advertising-subsidized online content at $1,404 per year in 2020—a 17% increase from 2016.[40] Regulatory frameworks that inhibit or restrict digital advertising can cripple news sites, blogs, online encyclopedias, and other vital information repositories, and these unintended consequences also translate into a new tax on consumers. The effects of such regulatory frameworks ultimately harm consumers by reducing the availability of free or low-cost educational content that is available online.

C. Consumers Prefer Personalized Ads & Ad-Supported Digital Content and Media

Consumers, across income levels and geography, embrace the ad-supported Internet and use it to create value in all areas of life. Importantly, research demonstrates that consumers are generally not reluctant to participate online due to data-driven advertising and marketing practices. One study found more than half of consumers (53 percent) desire relevant ads, and a significant majority (86 percent) desire tailored discounts for online products and services.[41] Additionally, in a recent Zogby survey conducted by the Digital Advertising Alliance, 90 percent of consumers stated that free content was important to the overall value of the Internet and 85 percent surveyed stated they prefer the existing ad-supported model, where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.[42] Indeed, as the Federal Trade Commission noted in its recent comments to the National Telecommunications and Information Administration, if a subscription-based model replaced the ad-based model, many consumers likely would not be able to afford access to, or would be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.[43]

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[36] *Id*. at 15-16. *See also* Damien Geradin, Theano Karanikioti & Dimitrios Katsifis, *GDPR Myopia: how a well-intended regulation ended up favouring large online platforms - the case of ad tech*, EUROPEAN COMPETITION JOURNAL (Dec, 18, 2020), located here.
[37] Deighton 2020 at 28.
[38] *See* Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located here.
[39] *See* John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located here.
[40] Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at $1,400/Year; Annual Value Jumps More Than $200 Since 2016* (Sept. 28, 2020), located here.
[41] Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), located here.
[42] Digital Advertising Alliance, *Zogby Analytics Public Opinion Survey on Value of the Ad-Supported Internet Summary Report* (May 2016), located here.
[43] Federal Trade Commission, *In re Developing the Administration's Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located here.

IX. Conclusion

During challenging societal and economic times such as those we are currently experiencing, laws that restrict access to information and economic growth can have lasting and damaging effects. The ability of consumers to provide, and companies to responsibly collect and use, consumer data has been an integral part of the dissemination of information and the fabric of our economy for decades. The collection and use of data are vital to our daily lives, as much of the content we consume over the Internet is powered by open flows of information that are supported by advertising. We therefore respectfully ask you to carefully consider the proposed regulations' potential impact on advertising, the consumers who reap the benefits of such advertising, and the overall economy as you continue to refine the draft rules.

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Thank you in advance for consideration of this letter.

Sincerely,

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