

January 18, 2023

The Hon. Philip J. Weiser
Attorney General
Colorado Department of Law
Ralph L. Carr Judicial Building
1300 Broadway, 10th Floor
Denver, CO 80203

Dear Attorney General Weiser,

On behalf of the Network Advertising Initiative (“NAI”), thank you for the opportunity to comment in response to Version 2 of the Proposed Draft Rules (“Revised Draft Rules”) for the Colorado Privacy Act (“CPA”), and for the thoughtful and open process to develop CPA implementing regulations.

The NAI applauds your continued commitment to public engagement in this important rulemaking process. We appreciated the opportunity to provide written comments on the initial draft regulations, and to participate in the robust discussions during the three stakeholder sessions in November 2022. The NAI also appreciates many of the modifications made in the Revised Draft Rules in response to our initial comments, and the thoughtful questions regarding key aspects of CPA implementing regulations. The following recommendations represent follow-up items based on the NAI’s initial set of comments responding to some of the questions raised and modifications proposed in the Revised Draft Rules.

I. Rule 2.02, 6.05 – BONA FIDE LOYALTY PROGRAMS (4 CCR 904-3)

The Revised Draft Rules package raises questions about the definition “Bona Fide Loyalty Program” (“Loyalty Program”) established in Sec. 2.02, and whether it is appropriately defined, or whether this definition should be narrowed.

The NAI supports the definition provided in the draft rules because it accurately reflects the nature of these programs as broader than merely existing to promote repeat consumer business. As currently drafted, the definition of Loyalty Programs matches the broad nature intended by the CPA, and specifically referenced in the statute, including “rewards, premium features, discount, or club card programs.”¹ Loyalty programs and promotions help provide insight into consumer attitudes and engagement, while also creating meaningful interactions with these consumers as part of a value exchange. As such, it is a common industry practice for such programs providing rewards and premium features to be provided to consumers in exchange for the Controller’s ability to provide tailored advertising and marketing, including in many cases sharing the data with key business partners.

¹ Rule 2.02, 4 Colo. Code Regs. § 904-3 (proposed).

The modified regulations package also explores when a Controller should be able to prevent a Consumer from obtaining the benefits of a Loyalty Program based on “that Consumer’s decision to opt out of the sale of Personal Data, or Processing of Personal Data for Targeted Advertising or Profiling in furtherance of decisions that produce legal or similarly significant effects concerning a consumer.”²

The current definition provided in the regulations specifically refers to the voluntary nature of a Consumer’s engagement in Loyalty Programs.³ This reflects the way these programs are commonly deployed by businesses, providing benefits to both consumers and the businesses that offer them. So long as a Controller follows the steps established in Rule Sec. 6.05(E) regarding notice requirements, Consumers are provided an opportunity to make informed decisions as to whether or not to use any such Loyalty Program based on the Program’s associated data collection and use. Consistent with the text of the CPA and the corresponding requirements for Controller transparency around Loyalty Programs, Controllers should retain the ability to determine whether to extend the benefits of such a program to a consumer based on their agreement to allow for Targeted Advertising, and sharing the Consumer’s personal data with business partners for these purposes.

The suggestions we have presented in these comments are supported by a range of research regarding consumer interactions with loyalty programs, as well as their expectations and preferences. One study revealed that 87 percent of consumers indicated openness to sharing personal data, including having details of their engagement activity monitored.⁴ Additional survey research assessed consumer preferences regarding data sharing, reflecting substantial consumer awareness of data collection associated with Loyalty Programs, revealing respondent preferences for programs that share less personal information.⁵ Both of these reports reflect a trend of consumer understanding of the key role their data plays and the underlying value exchange driving the popularity of Loyalty Programs.

The CPA and Revised Draft Rules as currently drafted reflect a practical approach to guide Controllers responsible processing of Consumer Data in accordance with the law, maintaining the CPA’s emphasis on the role of transparency and choice for consumers to make informed decisions about their participation depending on the scope and terms of the Program, and for Controllers to offer, “...a different price, rate, level, quality, or selection of goods or services to a Consumer, including offering goods or services for no fee, if the offer is related to a Consumer’s voluntary participation...” in a Loyalty Program as established by the CPA.⁶

² See Section 4 of the Revised Rulemaking Package, Rule 6.05, Colo. Code Regs. § 904-3 (proposed).

³ “‘Bona Fide Loyalty Program’ as referred to in C.R.S. § 1-6-1308(1)(d) is defined as a loyalty, rewards, premium feature, discount, or club card program established for the genuine purpose of providing discounts, rewards, or other actual value to Consumers that *voluntarily* participate in that program.” Rule 2.02, Colo. Code of Regs § 904-3 (proposed).

⁴ BOND BRAND LOYALTY, THE LOYALTY REPORT 2018, at 6 (2018), https://cdn2.hubspot.net/hubfs/352767/Loyalty%20Report%202018%20Files/Bond_TheLoyaltyReport%202018%20US_Exec%20Summary.pdf?__hstc=20629287.9baff9b886da5e2fe655b4113897e76d.1580934235534.1585683608724.1586982181323.7&__hssc=20629287.3.1586982181323&__hsfp=3576519970.

⁵ PRWeb, *Most Americans Less Likely to Join Customer Loyalty Program that Collects Personal Information (71%) or Requires an App (58%), According to Survey on Behalf of Wilbur*, WWW.PRWEB.COM (Apr. 16, 2019), https://www.prweb.com/releases/most_americans_less_likely_to_join_customer_loyalty_program_that_collects_personal_information_71_or_requires_an_app_58_according_to_survey_on_behalf_of_wilbur/prweb16246312.htm.

⁶ COLO. REV. STAT. § 6-1-1308(1)(d).

II. Rule 4.04 – RIGHT OF ACCESS

The Revised Draft Rules include a new, more detailed and expansive requirement for the types of Personal Data to be provided to consumers in response to data access requests, including “inferences” and “derivative data.”⁷ The NAI recognizes the value for consumers seeking access to the collection of their Personal Data to also have access to inferences derived based on that data. However, this requirement could be more clear and practical for Controllers. As currently drafted, the provision is ambiguous and could generate uncertainty about what additional data should be disclosed. Ideally, consumers can receive meaningful disclosures about their Personal Data and associated inferences, without associated data that is unnecessary and incomprehensible and is likely to make the disclosures less helpful. Therefore, the NAI recommends that this definition be amended as follows:

“Specific pieces of Personal Data includes final profiling decisions, ~~inferences, derivative data,~~ and other inferences associated with personal data created by the controller which is linked or reasonably linkable to an identified or identifiable individual.” (Rule 4.04(A)(1))

III. Rule 5.04 – DEFAULT SETTINGS FOR UNIVERSAL OPT-OUT MECHANISMS

Enabling consumers to express their privacy preferences through easy-to-use choice mechanisms remains an NAI priority. We appreciate the recognition in the proposed draft rules that default settings on a pre-installed tool shall not be recognized as a valid Universal Opt-Out Mechanism (UOOM), as it does not meet the CPA’s threshold of “affirmative, freely given consent,” unless a consumer knowingly activates such a feature.⁸ It appears that the amendments proposed in the Revised Draft Rule in Sec. 5.04 are intended to further clarify when a consumers’ selection of a product *could* reasonably constitute affirmative, freely given consent.⁹ However, the NAI is concerned that the proposed amendment does not meet the CPA’s explicit consent threshold. As currently drafted, there is a strong possibility that a consumer may select and deploy a tool for a wide range of functional reasons, and at the same time inadvertently activate a UOOM because it was merely one of multiple features for which the product was marketed.

While we appreciate the additional focus on this area, the Revised Draft Rule would not ensure an “unambiguous choice to opt out of the processing of personal data,” as required by the CPA.¹⁰ Individual software products and applications are often marketed for a wide range of purposes and user functionality, including but not limited to privacy features. Specifically, striking the term “prominently” in reference to product marketing requirements, and adding additional clarifications that such a tool “may also describe functionality other than the exercise of opt out rights,” does not provide sufficient clarity to ensure that a consumer would be selecting a product for the intended purpose of providing a UOOM, rather than other unrelated functionality.¹¹

⁷ “Specific pieces of Personal Data includes final profiling decisions, inferences, derivative data, and other personal data created by the controller which is linked or reasonably linkable to an identified or identifiable individual.” Rule 4.04(A)(1), Colo. Code Regs. § 904-3 (proposed).

⁸ COLO. REV. STAT. § 6-1-1312(2) (2022).

⁹ Rule 5.04, Colo. Code of Regs § 904-3 (proposed).

¹⁰ COLO. REV. STAT. § 6-1-1312(2) (2022).

¹¹ Rule Sec. 5.04(B), Colo. Code Regs. § 904-3 (proposed).

The NAI therefore recommends that the regulations maintain a consistent requirement that a consumer need activate a UOOM on any tool, pre-installed or otherwise, and that 5.04(B) is stricken. At a minimum, the requirement should be clarified to require that the tool is marketed “predominantly” for the purpose of providing a UOOM.

IV. Rule 5.07 – SYSTEMS FOR RECOGNIZING USER OPT OUT MECHANISMS

As the NAI noted in our initial comments and at the stakeholder sessions in November 2022, we strongly support Sec. 5.07(D), particularly the factors listed in (D)(1)-(3) establishing a set of criteria for the Department of Law (“DOL”) to consider when determining which tools should be recognized as UOOM(s) under the CPA. We continue to recommend that the CPA implementing regulations explicitly establish a series of key criteria for the process through which any UOOM would be recognized, including the role of stakeholder input into this process, and the ongoing nature of the oversight by DOL to assess updates in tools as their functionality evolves following their approval by the DOL.

In answer to the question posed in the modified draft rulemaking package, the NAI does not believe that the process need be “fully prescribed in this rulemaking,” but that the rulemaking formally recognizes the following key requirements:

- Tools intended to provide UOOMs should be formally submitted by the tool publisher to the DOL;
- All such tools submitted for approval must be reviewed by DOL staff and determined to meet the criteria established in the CPA and implementing rules;
- All proposed UOOMs must also be publicly disclosed and provide for the opportunity of at least 90 days for public evaluation and comment;
- All UOOMs recognized at the end of the process should be continually evaluated, on an annual basis, and public input solicited and considered as part of an ongoing review process.

V. Rule 4.01 – CONSUMER PERSONAL DATA RIGHTS

The modified draft rulemaking package raises important questions about the use of IP addresses to authenticate the location of Consumers adopting out of the sale of Personal Data or use of Personal Data for Targeted Advertising using a UOOM, and it seeks input on alternative methods to authenticate Consumers’ locations in this context. Unfortunately, while IP address lookups are the primary approach in use today, this approach is not reliable, and in many cases it does not provide an effective authentication method for Controllers. Increasingly, consumers may be deploying a virtual private network that masks an IP address for security, or for other purposes. Additionally, various platform and software or application providers often deploy technology that blocks IP addresses for added security or privacy protections. As these practices become more commonly deployed, IP address lookups will become an increasing challenge for Controllers to authenticate the state residence of Consumers.

While the NAI hopes that Controllers will seek to apply UOOMs to residents regardless of where they reside, inconsistent and conflicting requirements across state laws make determinations about honoring these requirements increasingly challenging. In the absence of readily available technology solutions to help Controllers determine in which state Consumers reside, the regulations could encourage the development of UOOMs that provide consumers with the opportunity to authenticate themselves as a resident of whichever state they live. If Consumers could make this determination, their residency

information could be transmitted by the UOOM signaling mechanism, such as an http signal passed to Controllers. In addition to transmitting the consumer's request to opt out, these signals could be crafted to convey the Consumer's residency, potentially remedying the issue presented by the use of IP addresses. While technological solutions are not available in the marketplace today to effectively transmit, receive and process this additional residency information between Consumers, Controllers and Processors, encouraging this functionality in UOOMs could help provide an incentive to develop new technology solutions to address this critical challenge that will become increasingly complex with the enactment of additional state laws and differing opt out requirements.

VI. Conclusion

Again, thank you for providing a thorough and open process for developing and implementing regulations for the CPA. The NAI is grateful for this opportunity to comment on the proposed draft rules, and I look forward to participating virtually in the hearing scheduled for February 1, 2023.

Respectfully Submitted,

David LeDuc
Vice President, Public Policy
Network Advertising Initiative (NAI)