

November 21, 2022

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

Dear California Privacy Protection Agency,

On behalf of the Network Advertising Initiative (“NAI”), we appreciate the opportunity to provide comments on the proposed modified regulations under the California Privacy Rights Act (“CPRA”).

The Network Advertising Initiative (NAI) is the leading self-regulatory organization dedicated to responsible data collection and use by advertising technology companies engaged in Tailored Advertising and Ad Delivery and Reporting. For over 20 years, the NAI has promoted a robust digital advertising industry by maintaining and enforcing the highest voluntary standards for the responsible collection and use of consumer data for digital advertising. Our member companies range from large multinational corporations to small startups and represent a significant portion of the digital advertising technology ecosystem.

Thank you for considering the comments we provided during the initial comment period on the proposed regulations, and for incorporating a series of changes to address some of those recommendations. We particularly appreciate the sentiment expressed unanimously by the Board members at the meeting on October 28-29th, for the California Privacy Protection Agency (“Agency”) to be a “reasonable enforcement agency,” and the subsequent addition of language directing the Agency to consider a business’ “good faith efforts to comply with those requirements.”¹ We believe this should be a key principle for Agency enforcement efforts in perpetuity, and it will be particularly important if the Agency proceeds with enforcement on July 1, 2023, less than six months after the finalization of initial implementing regulations.

However, the NAI remains concerned that a series of fundamental additional modifications are necessary to bring the regulations in line with the CPRA, particularly those that we previously

¹ CAL. CODE REGS. tit. 11 §7301(b).

identified regarding opt-out preference signals (“preference signals”).² We hope you will consider further updates in this area as you initiate additional regulatory proceedings.

At this time, we submit the following limited additional comments pertaining to two key sections where we believe more time and consideration are necessary before adopting the proposed modified regulations. We also respectfully request enhancements to the rulemaking process for future proceedings to ensure a greater opportunity for engagement and input by stakeholders.

I. § 7025: Opt-Out Preference Signals

First, the modified proposed regulations add a new term in Sec. 7025, “pseudonymous profiles,” that is not defined by either the CPRA or proposed regulations, and they create a new requirement for businesses to extend the application of opt-out preference signals for “...any consumer profile associated with that browser or device, including pseudonymous profiles.”³

Pseudonymous identifiers are used by NAI members and across the digital advertising industry principally to avoid associating inferences for tailored advertising with specific individuals. This has long been a requirement of the NAI Code of Conduct, which differentiates between “device-identified information” and “personally-identified information,” and prohibits their merger.⁴ It is a privacy benefit for consumers that is not required by any U.S. federal or state laws, including the CPRA. Unfortunately the new term and requirement do not provide clear direction for businesses regarding how to apply preference signals to “pseudonymous profiles.” Therefore, the NAI recommends deleting this new term and requirement until it can be considered more thoroughly and the regulations can more clearly provide guidance to businesses about what is expected.

II. § 7002: Restrictions on the Collection and Use of Personal Information

Second, the NAI supports the CPRA’s emphasis on clear notice requirements, and we agree that businesses should not collect, use, and share personal information for purposes incompatible with these notices. However, Sec. 7002 of the proposed modified regulations substantially revises the restrictions, particularly in Section 7002(b), focusing on the purposes for which personal information is collected. The updated draft regulations now specify that the purposes for which personal information is collected or processed shall be consistent with the “reasonable expectations of the consumer,” which is ultimately undefined by law and is subject to a broad range of potential interpretations.

As we expressed in our initial comments to the proposed regulations, the NAI is concerned that the regulations in this area, though expansive beyond the requirements established in the

² See NAI Comments;

https://thenai.org/wp-content/uploads/2022/08/NAI_Comments_Proposed-CPRA-Regulations.pdf

³ CAL. CODE REGS. tit. 11, § 7025(c)(1)(proposed).

⁴ NETWORK ADVERTISING INITIATIVE, 2020 Code of Conduct, § II.E.2 (2020).

CPRA, remain substantially ambiguous. Unfortunately, the modified proposed regulations potentially provide less clarity, instead leaving more uncertainty for businesses about what is expected of them for a wide range of practices.

We note that this section of the proposed regulations was of substantial interest and disagreement among board members during the October 27-28, board meeting. Board member Lydia de la Torre suggested that the Agency delay any implementing regulations in this section until such time as the Agency has had a greater opportunity to discuss and refine the regulations, including the goal to align requirements as closely as possible to requirements established by other laws, noting that the Agency is not required to develop regulations on this section in the CPRA. The NAI concurs with this sentiment, and we therefore recommend that the Agency strike this section from the modified proposed regulations and revisit in future rulemakings that the Agency has committed to conducting. Such a step would facilitate greater consistency for business and consumers, particularly in the early days of CPRA implementation.

III. Future CPRA Rulemaking Process

Over the last two weeks, the NAI has been actively engaging in the open stakeholder process conducted by the Colorado Department of Law (CDL), as an initial step to gain input into the rulemaking process for the Colorado Privacy Act. This interactive process has provided the opportunity for stakeholders, including businesses, civil society, and other stakeholders such as the CPPA staff, to not only submit initial written comments, but also to engage directly in civil discussion. It was particularly valuable for the NAI and other stakeholders to have the CDL pose a series of questions highlighting opportunities and challenges posed by the proposed regulations, with the goal to balance strong privacy objectives with pragmatic rules to enable more effective compliance.

This process contrasts with how the CPPA has conducted its own rulemaking process for the CPRA thus far. Notably, in the agency Board meeting on October 28-29th, there were concerns expressed among the Board about the rushed process and lack of discussion on multiple key items. Also, stakeholders were not provided with a meaningful opportunity to engage directly. Instead, public comments were invited only at the end of that meeting, after the Board had already drafted and all but committed to a motion directing the CPPA staff to modify the proposed regulations in accordance with the discussion.

The NAI recognizes that California law establishes a formal process and detailed set of requirements for drafting and approval of implementing regulations, but we do not believe these requirements should be viewed as a ceiling, but rather a floor for public engagement for regulations that will have a substantial impact on businesses across the country. Indeed, this is consistent with the law's requirement to "solicit broad public participation."⁵ We also recognize and support the CPPA's goal to finalize this set of implementing regulations as soon as

⁵ See CAL. CIV. CODE § 1798.185(a).

reasonably possible to best meet the CPRA statutory requirements for the law to become operative in January 2023, and enforcement to begin on July 1, 2023.

However, as the leading self-regulatory association for digital advertising, we engage deeply with our members and other stakeholders in an effort to interpret draft regulations, and to provide valuable input to the Agency. We therefore hope you will consider enhancing the process for future rulemakings to enable more robust participation by the NAI and other stakeholders committed to aiding industry compliance.

IV. Conclusion

The NAI recognizes and concurs with the Agency's goals to provide clear implementing regulations for the CPRA as soon as reasonably possible, and we hope you will consider these recommendations as consistent with your efforts at this time. If we can provide any additional information, or otherwise assist your office as it continues to engage in the rulemaking process, please do not hesitate to contact me at david@thenai.org.

Respectfully Submitted,

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