Comments of Consumer Reports
In Response to the
California Privacy Protection Agency on the
Modified Text of Proposed Rules under the California Privacy Rights Act of 2020

By

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Consumer Reports[1] appreciates the opportunity to comment on the modified proposed rules (the Modified Draft Regulations) interpreting the California Privacy Rights Act (CPRA).[2] We thank the California Privacy Protection Agency (CPPA) for soliciting input to make the California Consumer Privacy Act (CCPA),[3] as amended by Proposition 24, work for consumers.

The Modified Draft Regulations appear to have been changed largely to accommodate businesses who criticized the scope and text of the original Draft Regulations. While the CPPA certainly should consider ease and cost of compliance in promulgating its regulations, the Modified Draft Regulations have swung too far in the wrong direction. By removing certain provisions proscribing anti-consumer practices, the CPPA is signaling that behaviors previously prohibited by those provisions are now legitimate. We urge the CPPA to either undo certain revisions or make further revisions to ensure that the CPRA effectively protects California consumers.

§ 7004. Requirements for Methods for Submitting CCPA Requests and Obtaining Consumer Consent.

We strongly disagree with the new language contained in § 7004(c) replacing "regardless of user intent" with "A business's intent in designing the interface is not determinative in whether the user interface is a dark pattern, but a factor to be considered." Setting aside the practical difficulty in proving subjective intent, business intent is *never* relevant in assessing whether a particular design is deceptive or not. The effect of the pattern on the user is the only relevant consideration. For this reason, intent is typically not an element of consumer protection laws such as federal and state prohibitions on deceptive and unfair business practices. A company's intent may be a consideration for a regulator in deciding whether to bring an action or in determining the appropriate penalty in a settlement. It is not, however, a relevant consideration in determining whether a legal violation has occurred. We urge the CPPA to revert to the previous langage.

We also urge the CPPA to revert the last two examples removed from § 7004(a)(2) and the first example removed from § 7004(a)(4). All three are straightforward examples of

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[1] Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For over 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests, including their interest in securing effective privacy protections. Unconstrained by advertising, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

[2] California Privacy Protection Agency, Notice of Proposed Rulemaking, (Jul. 8, 2022), https://cppa.ca.gov/regulations/pdf/20220708_npr.pdf.

[3] For purposes of this comment, we will refer to the current text of California's privacy law — as amended by the CPRA — as the CPRA. References to the CCPA are references to the original CCPA before it was amended.

deceptive dark patterns; removing them signals to industry that these practices are now considered legal and allowable under the CPRA. The two examples in § 7004(a)(2) are clear violations of the principle of "symmetry of choice" — in both, the options to allow data collection are obviously more prominent and asymmetrical. In § 7004(a)(4), forcing a user to agree to the likely factually incorrect statement of "I don't like to save money" in order to decline consent for data collection is clearly abusive and unjustifiable. We also reiterate our suggestion from our previous comments where we urged the CPPA to specify that more prominent choices that lead to additional data collection are prohibited, while privacy-preserving options are allowed to be more prominent.[4]

§ 7012. Notice at Collection of Personal Information.

We recommend restatement of § 7012(e)(6)'s requirement that companies provide either notice of specific third parties with whom they share data or a description of the third parties' business practices. The provision already offered companies flexibility in either identifying companies or at least describing their practices to consumers. The CPRA requires companies to disclose the "categories" of third parties with whom data is shared; a description of third parties' business practices is needed in order to make those categories comprehensible.

§ 7013. Notice of Right to Opt-Out of Sale/Sharing of and the "Do Not Sell or Share My Personal Information" Link.

We recommend reinstatement of the examples deleted from § 7013(e)(3). Both are uncontroversial examples of the principle stated in § 7013(e)(3) that "A business shall also provide the notice to opt-out of sale/sharing in the same manner in which it collects the personal information that it sells or shares." Deleting these examples from the draft regulations will lead to the implication that connected devices and virtual reality systems *do not*, in fact, need to provide notice in the same manner in which they collect personal information.

§ 7016. Notice of Financial Incentive.

While the Modified Draft Regulations do not make any significant changes to this section, we remain disappointed that it does not provide clear guidance to companies or consumers as to what practices might violate § 125(b)(4) of the CPRA's provision that a "business shall not use financial incentive practices that are unjust, unreasonable, coercive, or usurious in nature." We reiterate our previous remarks that the CPPA should clarify that offers should be presumed to be illegitimate in concentrated markets or markets for essential services,

[4] Comments of Consumer Reports In Response to the California Privacy Protection Agency on the Text of Proposed Rules under the California Privacy Rights Act of 2020, (Aug. 23, 2022), at 9, https://advocacy.consumerreports.org/wp-content/uploads/2022/08/CPPA-regs-comments-summer-2022-1.pdf.

and that companies should be required to provide an accounting of the "good-faith estimate of the value of the consumer's data" as required by the CPRA.[5]

§ 7025. Opt-Out Preference Signals.
§ 7026. Requests to Opt-Out of Sale/Sharing.

In general, we support the new language in § 7025 clarifying that companies who receive an opt-out preference signal in one context must apply that opt-out in other contexts where it recognizes the consumer, account, or device. The revisions to the examples in this section are also helpful in this regard.

We also restate our suggestion that the CPPA consider hosting a registry of legally binding OOPS signals; we note that the Colorado Privacy Act draft regulations published last month commit the Colorado Department of Law to hosting and maintaining a comparable registry.[6]

However, we disagree with the changes to § 7025(c)(6) and § 7026(g) making it only optional for companies to provide notice to consumers that their opt-out choices have been honored. Failure to understand whether opt-out selections were effective or not was a common complaint from consumers who participated in Consumer Report's crowdsourced study on the efficacy of opt-out rights.[7] We remained concerned that due to either technical malfunctions or simple malfeasance, consumers' invocation of opt-out rights may not be effective in practice; a standardized notice that an opt-out has been recognized would help put consumers' minds at ease.

We are especially worried about companies using dodgy interfaces to purportedly obtain consent to disregard generally applicable opt-out preference signals. For this reason, even if the CPPA does not want to require *every* company to display opt-out state, the CPPA should require that companies that *disregard* a recognized OOPS control — either because the company believes it has re-opt-in consent or because it does not believe the signal conforms to the CPRA's requirements for an OOPS — must provide prominent notice to consumers that the OOPS is not considered operative. This approach would incentivize companies to respect OOPS signals and disincentivize bad faith efforts to generate spurious consent.

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[5] *Id.* at 10.
[6] *Id.* at 5. *See also* Colorado Department of Law, Consumer Protection Section, Colorado Privacy Act Rules 4 CCR-904-3, https://coag.gov/app/uploads/2022/10/CPA_Final-Draft-Rules-9.29.22.pdf.
[7] Maureen Mahoney, *California Consumer Privacy Act: Are Consumers' Digital Rights Protected?* , Consumer Reports, (Oct.1, 2020), https://advocacy.consumerreports.org/wp-content/uploads/2021/05/CR_CCPA-Are-Consumers-Digital-Rights-Protected_092020_vf2.pdf.

We thank the CPPA for its consideration of these points, and for its work to secure strong privacy protections for consumers. We are happy to answer any questions you may have, and to discuss these issues in more detail. Please contact Justin Brookman (justin.brookman@consumer.org) for more information.