



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

January 31, 2022

Re: CPA Public Comment of Insights Association

To whom it may concern:

The Insights Association (“Insights”) submits the following comments regarding the proposed rules relating to the Colorado Privacy Act (“CPA”).

With more than 115 members in Colorado and more than 7,000 overall, Insights is the leading nonprofit trade association for the market research¹ and data analytics industry. We are the world’s leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations, employees, students and citizens. With that essential understanding, leaders can make intelligent decisions and deploy strategies and tactics to build trust, inspire innovation, realize the full potential of individuals and teams, and successfully create and promote products, services and ideas.

CPA is going to have a substantial impact on the business community, including the market research and data analytics industry. Small and medium-sized research firms in particular will face tremendous costs in updating and expanding on their already-extensive compliance efforts in connection with the California Consumer Privacy Act of 2018 (“CCPA”) and other states’ laws. Accordingly, and on behalf of our members, we commend your decision to seek input on the proposed rules and are grateful for the opportunity to comment.

1. Prevent audience measurement from being misconstrued as targeted advertising.

The CPA definition of “targeted advertising” excludes “[p]rocessing personal data solely for measuring or reporting advertising performance, reach, or frequency.”² Insights urges the Attorney General to clarify that the exclusion is not just for internal first-party measurement, but also for “independent” measurement, and that it is for measurement of content, in addition to measurement of advertising.

Audience measurement, particularly independent audience measurement, builds the currency upon which advertising and other content, online and off, is valued, and collects covered data about individuals for the

¹ Market research, as defined in model federal privacy legislation from Privacy for America and in the federal bill ADPPA passed in House committee in 2022 (Sec. 2 (22)), is “the collection, use, maintenance, or transfer of personal information as reasonably necessary to investigate the market for or marketing of products, services, or ideas, where the information is not: (i) integrated into any product or service; (ii) otherwise used to contact any particular individual or device; or (ii) used to advertise or market to any particular individual or device.” See Part I, Section 1, R: <https://www.privacyforamerica.com/overview/principles-for-privacy-legislation-dec-2019/>

² 6-1-1303 (25)(b)(III)

purpose of understanding groups. Advertisers, for example, pay based on the number of "impressions" for online ads, and independent measurement verifies that the number of impressions is accurate. Local Colorado businesses would bear the burden of these elevated costs for every impression inaccurately added to the count. Independent measurement also allows content creators to know their actual viewership in relation to the marketplace thus allowing for accurate programming decisions.

The exception would still require that the data would be limited "solely" to measurement, preventing its use for other purposes.

Therefore, Insights encourages the Attorney General to clarify that this exception covers independent measurement, and content as well as advertisement, just like the language in the federal privacy bill that passed committee in the House in 2022.³

2. Should the process for determining which [opt out] mechanisms will be recognized be fully prescribed in this rulemaking, or can it be developed later? What should the process for determining which mechanisms entail?

Yes, it should be prescribed now. Among other things, the process for determining which opt out mechanisms will be recognized should take into account the cost of implementing such mechanisms, and which mechanisms are presently being offered in the market as stand-alone technology solutions (rather than components of a larger package) to help medium- and smaller-sized businesses comply.

3. Do Controllers who have updated their privacy policies to comply with California's privacy notice requirements anticipate making a separate policy for Colorado, updating a California specific privacy notice to include Colorado or other state requirements, or revising the main privacy policy/notice to meet Colorado and other non-California state requirements?

We strongly urge the Attorney General to continue to draft rules so that separate privacy policies and even stand-alone, state-specific sections within a given privacy policy are not required. As you are aware, by the end of the year there will be *five* different state consumer privacy laws in effect across the United States. A proliferation of state state-specific notices and disclosures will confuse consumers and not meaningfully further consumer privacy.

4. Clarify that labeling an opt out link "Your Privacy Rights," in compliance with California law, is sufficient under Rule 4.03(B)(2)(a).

The above-referenced Rule requires that the text for an opt-out link "must provide a clear understanding of its purpose," and lists the following link titles as acceptable examples: "Colorado Opt-Out Rights," "Personal Data Use Opt-Out," and "Your Opt-Out Rights." California law gives businesses the option to post an opt-out link titled "Your Privacy Choices." We ask the Attorney General to expressly clarify that this precise verbiage would satisfy the above-referenced Rule.

5. Clarify that respondents who voluntarily give their sensitive data in connection with a research study are deemed to have consented to use of that data for research purposes.

Under CPA, controllers must obtain consent to process sensitive data; provided, however, that per Rule 6.10 controllers may process sensitive data without consent if, among other requirements, the processing

³ The federal ADPPA (H.R. 8152), as passed in House committee in 2022, in Sec. 2 (34)(B)(iii): "processing covered data solely for measuring or reporting advertising or content, performance, reach, or frequency, including independent measurement." <https://www.congress.gov/bill/117th-congress/house-bill/8152/text>

purpose would be “obvious to a reasonable Consumer based on the context of the collection and use of the Personal Data.” We respectfully request a clarification that where a research subject provides sensitive data (e.g., demographic information concerning race/ethnicity) as part of a market research study, it would be “obvious” that such sensitive data is going to be processed for research purposes, including without limitation to provide research clients with insights into the preferences of specific demographic groups.

6. Limit the “authorized agent” concept to minors, and elderly or incapacitated individuals

Under the CPA, a consumer may designate an authorized agent to submit opt-out requests, and requests to know and delete. There is currently no limitation on this procedure. Anyone can submit a request through an authorized agent. Increasingly, our members are receiving requests from purported authorized agents and are caught between, on one hand, wanting to honor legitimate requests and, on the other, the pervasive concern that the authorized agent mechanism invites fraud. Of course, our members take steps to verify such requests, as required by law, but those verification efforts are sometimes difficult to complete without requesting additional information, and tend to frustrate agents and/or consumers as much as they frustrate the business.

The registered agent option is unnecessary in the vast majority of cases, increases paperwork associated with the verification process, and opens the door for fraudulent requests designed to harm consumers. Except in cases where the consumer is a minor, or someone who genuinely needs an authorized agent to submit a request (such as an elderly or incapacitated individual), the purpose of the law is better served by requiring requests to be submitted by consumers themselves.

Conclusion

We hope the above comments will be useful to you and your team, and we are happy to entertain any questions or concerns you may have about the market research and data analytics industry.

Again, we appreciate the opportunity to comment.

Sincerely,

Howard Fienberg
Senior VP, Advocacy
Insights Association

Stuart Pardau
Counsel to Insights Association

Blake Edwards
Counsel to Insights Association