California Privacy Protection Agency
Attn: Debra Castanon
915 Capitol Mall, Suite 350A
Sacramento, CA 95814
regulations@cppa.ca.gov

November 8, 2021

Re: Comments of the Insights Association on Proposed Rulemaking Under the California Privacy Rights Act of 2020 (Proceeding No. 01-21)

Ms. Castanon:

The Insights Association ("Insights") submits the following comments regarding future regulations relating to the California Privacy Rights Act of 2020 ("CPRA").

Representing more than 750 individuals and companies in California and more than 6,000 across the United States, Insights is the leading nonprofit trade association for the market research[1] 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.

The CPRA is going to have a profound 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"). Accordingly, and on behalf of our members, we commend your decision to seek input on future regulations and are grateful for the opportunity to comment.

1. Limit processing which presents a "significant risk" to consumers' privacy or security to highly sensitive personal information, such as financial account information

The CPRA directs the Agency to issue regulations "requiring businesses whose processing of consumers' personal information presents significant risk to consumers' privacy" to perform annual cybersecurity audits and submit regular risk assessments to the Agency. The Agency has specifically requested feedback on this provision.

[1] Market research, as defined in model federal privacy legislation from Privacy for America, 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/

We respectfully request that processing which presents a "significant risk" be limited to processing of highly sensitive personal information, such as financial account or payment card information, social security numbers, or other personal information which, if breached, could result in immediate financial harm to consumers.

2. Limit processing which presents a "significant risk" to processing which occurs on a regular basis or a minimum number of times per year

In addition to limiting "significant risk" scenarios as described above, the Agency could also clarify that such processing must occur on a regular basis, or at least with some minimal frequency, to trigger the auditing and risk assessment requirements. It does not meaningfully further the spirit of the CPRA, and imposes particularly unnecessary burdens on small businesses, to require an audit and security assessment solely on the basis of one, two, or a handful of isolated instances of processing deemed to present a "significant risk" in a given year.

3. Limit processing which presents a "significant risk" to processing of at least 100,000 records

Alternatively, we suggest the Agency could incorporate some numerical trigger into what constitutes "significant risk" processing. For example, this number could track the figure in the CPRA's "business" definition of 100,000 records, or the Agency could select some lower number. In any case, the underlying statutory language of the CPRA counsels in favor of some such numerical limit. The statute contemplates "significant risk to consumers' privacy or security," language which connotes larger concerns of aggregate risk, not every isolated presentation of risk to any individual consumer or small group of consumers.

4. Limit the audit and risk assessment requirement to businesses who meet one of the first two prongs of the CPRA's "business" definition

As the Agency is aware, there are three different ways for an organization to be defined as a "business" under the CPRA: (1) annual gross revenues in excess of $25 million; (2) buying, selling, or sharing the personal information of at least 100,000 consumers or households; or (3) deriving 50 percent or more of its annual revenues from selling or sharing personal information.

Because the third prong is not tied in any way to business size or processing volume, it includes a substantial number of small and medium-sized firms in the market research and data analytics industry. Firms who are subject to CPRA solely on the basis of this third prong should be exempt from any annual audit and risk assessment requirements. These audits and risk assessments will be time consuming and expensive, and could in fact cripple small businesses who are just trying to do legitimate marketing research and data analytics work which benefits larger businesses, nonprofit and educational organizations, government entities, and individual consumers.

Alternatively, the Agency could limit the audit and assessment requirements based on smaller limits than those in the CPRA's "business" definition (e.g., firms that do $15 million in revenue or deal with at least 50,000 records), to protect the smallest businesses from overly onerous regulatory requirements.

5. Clarify that use in research results and reports of "sensitive personal information" is a "reasonably expected" use of information provided in connection with corresponding surveys and research studies

Under the CPRA, consumers have the right to request that a business "limit its use of the consumer's sensitive personal information to that use which is necessary to perform the services or provide the goods

reasonably expected by an average consumer who requests such goods or services." The Agency has specifically requested comment on "what use or disclosure of a consumer's sensitive personal information by businesses should be permissible notwithstanding the consumer's direction to limit the use or disclosure of the consumer's sensitive personal information."

Insights is concerned that if research subjects who have provided sensitive personal information in connection with a survey or study (for example, in connection with a poll about an important political issue) submit such a request, this may compromise research results and leave market research firms in a legally unclear relationship with the research subject. Accordingly, the regulations should stipulate that use of sensitive personal information in research results, and the continued use of those results to draw insights about consumers, is a "reasonably expected" use of sensitive personal information which was freely provided in connection with a survey or research study.

6. Define "disproportionate effort" as those efforts which "do not, in the reasonable discretion of the business, meaningfully add to the consumer's understanding of the business's historical practices"

The CPRA preserves a consumer's right to "know" what personal information is being collected and what personal information is sold or shared and to whom. Previously, under CCPA, these rights were limited to a 12-month "look-back" period. Under the CPRA, if a consumer requests to know how information has been collected, sold, or shared, no matter how far back that request might reach, the only limitation on the request is whether it would be "impossible, or involve a disproportionate effort" on the part of the business.

The Agency has specifically requested input on what standard should govern a business's determination that providing information beyond the 12-month window is "impossible" or "would involve a disproportionate effort." In the market research and data analytics industry, information relating to a particular research subject (especially if that research subject participates in a research panel, for example) may appear in multiple studies across a long period of time. A research firm could spend theoretically limitless time and resources to reconstruct all the times a research subject was involved in a study, what information that study collected, and with whom the results were shared. Reconstructing every such instance would not meaningfully advance the consumer's rights under CPRA, and it is not clear how much of this "reconstruction" would constitute "disproportionate effort."

Accordingly, the Agency should clarify that "disproportionate efforts" beyond the 12-month window are "those additional efforts which require time and expense on the part of the business, but do not, in the reasonable discretion of the business, meaningfully add to the consumer's understanding of the business's historical practices." In the above-referenced panel participant scenario, for example, rather than reconstructing the facts around every past study, the business would only be required to make the requested disclosures beyond the 12-month window as necessary to ensure the research subject has a complete (if not completely granular) view of how the research subject's information is being processed.

7. Exempt market research from notices of financial incentives

For our members' research to be effective, they must ensure robust participation. This is frequently done through offering financial incentives. For example, a doctor may be offered an honorarium to answer a survey about various pharmaceuticals, or an individual may be offered a gift card to participate in a half-day focus group about the latest television shows.

Our industry has worked hard to comply with the financial incentive notice requirement under CCPA, but the notice of financial incentives requirements were not written with market research in mind; they inhibit research in an unintended way. Accordingly, we resubmit our request, made previously in connection

with the CCPA regulations, that market research incentives and similar rewards to research subjects be exempt from notices of financial incentives requirements under the CPRA. Most significant of all, appropriate notices of financial incentives are already provided in every legitimate market research execution. Adding parallel and/or potentially conflicting requirements will only confuse the issue for Insights members, their clients and the public at-large that participates in this research.

8. Limit the "authorized agent" concept to minors, and elderly or incapacitated individuals

Under the CPRA, 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.

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.

Sincerely,

Howard Fienberg
Senior VP, Advocacy
Insights Association

Stuart Pardau
Counsel to Insights Association

Blake Edwards
Counsel to Insights Association