California Privacy Protection Agency
Attn: Brian Soublet
2101 Arena Blvd.
Sacramento, CA 95834
regulations@cppa.ca.gov

August 11, 2022

Re: CPPA Public Comment of Insights Association on CPRA Rulemaking

Mr. Soublet,

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

Representing more than 770 individuals and companies in California and more than 5,500 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.

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 the proposed regulations and are grateful for the opportunity to comment.

1. Bring CPRA in line with draft federal privacy legislation and other state laws by adding audience measurement to the list of "business purposes"

As you are aware, CPRA requires that contracts with service providers "prohibit[] the person from...[c]ombining the personal information that the service provider receives from, or on behalf

[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/

of, the business with personal information that it receives from, or on behalf of, another person or persons, or collects from its own interaction with the consumer," with the exception that the service provider "may combine personal information to perform any business purpose as defined in [the] regulations."

This restriction has implications for certain methodologies used in our industry which we believe the Agency may not have intended. Specifically, conducting audience measurement requires de-duplicating the relevant data, which in turn requires combining, at least temporarily, the relevant data from the client business with a research firm's own internal data. Such a combination, and audience measurement more generally, is presumably not the type of activity the Agency intended to restrict. Accordingly, we request that audience measurement be added to the CPRA's list of "business purposes."

As you may be aware, this change by the Agency would bring CPRA in line with other privacy legislation and laws. **Draft federal legislation and extant state privacy statutes already make an accommodation for audience measurement**. For example, the American Data Privacy and Protection Act (H.R. 8152) exempts from the definition of targeted advertising "processing covered data solely for measuring or reporting advertising or content, performance, reach, or frequency, including independent measurement."[2] We urge the Agency to leverage the foregoing definition, which we believe most completely captures audience measurement activities. Extant state laws in Colorado, Connecticut and Utah may also, of course, provide further guidance.[3]

Finally, regardless of the foregoing suggestion, we would also urge the Agency to clarify that such audience measurement activities do not constitute "cross-contextual advertising," to avoid any ambiguity in the regulations, including if audience measurement is designated as a business purpose.

2. Limit the opt-out preference signal requirement to firms that 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.

---

[2] See American Data Privacy and Protection Act (pp. 15-16): https://www.insightsassociation.org/Portals/INSIGHTS/xBlog/uploads/2022/8/5/AmendmentsAdoptedbyHouseEnergyANDCommerceCommitteeDuringJuly202022MarkuptoJuly182022AINSPDF.pdf

[3] See UTAH CONSUMER PRIVACY ACT (S.B. 227), available at https://le.utah.gov/~2022/bills/static/SB0227.html ("'Targeted advertising' does not include...processing personal data solely to measure or report advertising performance, reach, or frequency"); CONNECTICUT DATA PRIVACY ACT (S.B. 6), available at https://www.cga.ct.gov/2022/ACT/PA/PDF/2022PA-00015-R00SB-00006-PA.PDF ("'Targeted advertising' does not include...processing personal data solely to measure or report advertising frequency, performance or reach."); COLORADO PRIVACY ACT (SB21-190), available at https://leg.colorado.gov/sites/default/files/2021a_190_signed.pdf ("'TARGETED ADVERTISING'...DOES NOT INCLUDE...PROCESSING PERSONAL DATA SOLELY FOR MEASURING OR REPORTING ADVERTISING PERFORMANCE, REACH, OR FREQUENCY").

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 implementing a solution to respond to opt-out preference signals.

In order to respond to these signals, firms will likely have to hire outside expertise to implement a technological solution, an expense which will be potentially significant for smaller firms. That expense may, moreover, be recurring — i.e., firms will likely have to update or at least review the technology regularly as opt-out signals evolve. Because this method for submitting an opt-out request is in addition to already-existing methods for submitting opt-out requests, we believe limiting the preference signal requirement as we propose would allow the Agency to balance the interests of small businesses without hampering the opt-out right of California consumers.

Alternatively, the Agency could limit the preference signal 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.

3. 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.

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.

4. 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.

5. 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.

6. Limit the audit and risk assessment requirement to firms that meet one of the first two prongs of the CPRA's "business" definition

We also request the Agency limit the audit and risk assessment requirements to larger firms, along the same lines as we requested for opt-out preference signals in point #2 above. 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 other businesses, nonprofit and educational organizations, government entities, and individual consumers.

7. 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." 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.

8. 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 participation 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.

9. 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.

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.

Insights is also eager to discuss the concept of audience measurement, specifically, if that would be helpful.

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