

CALIFORNIA PRIVACY PROTECTION AGENCY

915 Capitol Mall, Suite 350A
Sacramento, CA 95814
www.cppa.ca.gov

***DISCUSSION DRAFT FOR SEPTEMBER 7-8, 2021 CPPA BOARD MEETING*****INVITATION FOR PRELIMINARY COMMENTS ON PROPOSED RULEMAKING UNDER THE CALIFORNIA PRIVACY RIGHTS ACT OF 2020****Background**

In November of 2020, voters approved Proposition 24, The California Privacy Rights Act of 2020 ("CPRA"). The CPRA amends and extends the California Consumer Privacy Act of 2018 ("CCPA"). To implement the law, the CPRA established the California Privacy Protection Agency ("Agency") and vested it with the "full administrative power, authority and jurisdiction to implement and enforce the California Consumer Privacy Act of 2018."¹ The Agency's responsibilities include updating existing regulations, and adopting new regulations.²

Invitation for Comments

In accordance with Government Code sections 11346, subdivision (b), and 11346.45, the Agency seeks input from stakeholders in developing regulations.

The public is invited to submit comments related to any area on which the Agency has authority to adopt rules. The Agency is particularly interested in receiving views and comments on the topics and questions provided below. However, stakeholders are not limited to providing comments in the areas identified by the Agency and may comment on any potential area for rulemaking. The tenor and substance of the topics and questions should not be taken as an indication that the Agency is predisposed to any particular views, positions, or actions.

Comments will assist the Agency in developing new regulations, determining whether changes to existing regulations are necessary, and achieving the law's regulatory objectives in the most effective manner. The Agency invites stakeholders to propose specific language for new regulations and/or for changes to the existing regulations. Commenters are encouraged to review the short "Tips for Submitting Effective Comments" guide for help formulating and submitting effective comments.

This invitation for comments is not a proposed rulemaking action under Government Code section 11346. This invitation for comments is part of the Agency's preliminary rulemaking activities under Government Code section 11346, subdivision (b). The public will have the opportunity to provide additional comments on any proposed regulations or modifications when the Agency proceeds with a notice of proposed rulemaking action.

All terms used in this Invitation for Comments are as defined in the CCPA, as amended by the CPRA, and the CCPA regulations.³

¹ Civil Code, § 1798.199.10(a).

² See, e.g., Civil Code, § 1798.185.

³ See Code Regs., tit. 11, §§ 999.300–337.

Topics for Public Comment

The Agency welcomes all comments, but is particularly interested in comments on new and undecided issues not already covered by the existing CCPA regulations. Below, the Agency has formulated topics and questions to assist interested parties in providing input on rulemaking.

1. Processing that Presents a Significant Risk to Consumers' Privacy or Security: Cybersecurity Audits and Risk Assessments Performed by Businesses

The CPRA directs the Agency to issue regulations requiring businesses “whose processing of consumers’ personal information presents significant risk to consumers’ privacy or security” to 1) perform annual cybersecurity audits; and 2) submit to the Agency regular risk assessments regarding their processing of personal information.⁴

Comments on the following topics will assist the Agency in creating these regulations:

- a. When a business’s processing of personal information presents a “significant risk to consumers’ privacy or security.”⁵
- b. What businesses that perform annual cybersecurity audits should be required to do, including what they should cover in their audits and what processes are needed to ensure that audits are “thorough and independent.”⁶
- c. What businesses that submit risk assessments to the Agency should be required to do, including what they should cover in their risk assessments, how often they should submit risk assessments, and how they should weigh the risks and benefits of processing consumers’ personal information and sensitive personal information.⁷
- d. When “the risks to the privacy of the consumer [would] outweigh the benefits” of businesses’ processing consumer information, and when processing that presents a significant risk to consumers’ privacy or security should be restricted or prohibited.⁸

2. Automated Decisionmaking

The CPRA provides for regulations governing consumers’ “access and opt-out rights with respect to businesses’ use of automated decisionmaking technology.”⁹

Comments on the following topics will assist the Agency in creating these regulations:

- a. What activities should be deemed to constitute “automated decisionmaking technology” and/or “profiling.”¹⁰
- b. When consumers should be able to access information about businesses’ use of automated decisionmaking technology and what processes consumers and businesses should follow to facilitate access.¹¹
- c. What information businesses must provide to consumers in response to access requests, including what businesses must do in order to provide “meaningful information about the logic” involved in the automated decisionmaking process.¹²

⁴ Civil Code, § 1798.185(a)(15).

⁵ Civil Code, § 1798.185(a)(15).

⁶ Civil Code, § 1798.185(a)(15)(A).

⁷ See Civil Code, § 1798.185(a)(15)(B).

⁸ See Civil Code, § 1798.185(a)(15)(B).

⁹ Civil Code, § 1798.185(a)(16).

¹⁰ Civil Code, §§ 1798.185(a)(16) and 1798.140(z).

¹¹ See Civil Code, § 1798.185(a)(16).

¹² Civil Code, § 1798.185(a)(16).

- d. The scope of consumers' opt-out rights with regard to automated decisionmaking, and what processes consumers and businesses should follow to facilitate opt outs.¹³

3. *Audits Performed by the Agency*

The CPRA gives the Agency the authority to audit businesses' compliance with the law.¹⁴

Comments on the following topics will assist the Agency in creating regulations to define its audit authority:¹⁵

- a. What the scope of the Agency's audit authority should be.¹⁶
- b. The processes the Agency should follow when exercising its audit authority, and the criteria it should use to select businesses to audit.¹⁷
- c. The safeguards the Agency should adopt to protect consumers' personal information from disclosure to an auditor.¹⁸

4. *Consumers' Right to Delete, Right to Correct, and Right to Know*

The CCPA gives consumers certain rights to manage their personal information held by businesses, including the right to request deletion of personal information; the right to know what personal information is being collected; the right to access that personal information; and the right to know what categories of personal information are being sold or shared, and to whom.¹⁹ The CPRA amended the CCPA to add a new right: the right to request correction of inaccurate personal information.²⁰

The Attorney General has adopted regulations providing rules and procedures to facilitate the right to know and the right to delete.²¹ The CPRA additionally provides for regulations that establish rules and procedures to facilitate the new right to correct.²²

Comments on the following topics will assist the Agency in creating these regulations:

- a. The new rules and procedures, or changes to existing rules and procedures, needed for consumers to make requests to correct inaccurate personal information.²³
- b. How often, and under what circumstances, a consumer may request a correction to their personal information.²⁴
- c. How a business must respond to a request for correction, including the steps a business may take to prevent fraud.²⁵

¹³ See Civil Code, § 1798.185(a)(16).

¹⁴ See Civil Code, § 1798.199.65.

¹⁵ See Civil Code, § 1798.185(a)(18).

¹⁶ See Civil Code, § 1798.185(a)(18).

¹⁷ See Civil Code, § 1798.185(a)(18).

¹⁸ See Civil Code, § 1798.185(a)(18).

¹⁹ See Civil Code, §§ 1798.105, 1798.110, 1798.115, and 1798.130.

²⁰ See Civil Code, §§ 1798.106 and 1798.130.

²¹ See Code Regs., tit. 11, §§ 999.308(c), 999.312–313, 999.314(e), 999.318, 999.323–326, and 999.330(c).

²² See Civil Code, § 1798.185(a)(7).

²³ See Civil Code, §§ 1798.130 and 1798.185(a)(7).

²⁴ See Civil Code, § 1798.185(a)(8).

²⁵ See Civil Code, §§ 1798.130 and 1798.185(a)(8)(A)–(C).

- d. When a business should be exempted from the obligation to take action on a request because responding to the request would be “impossible, or involve a disproportionate effort” or because the information that is the object of the request is accurate.²⁶
- e. A consumer’s right to provide a written addendum to their record with the business, if the business rejects a request to correct their personal information.²⁷

5. *Consumers’ Rights to Opt-Out of the Selling or Sharing of Their Personal Information and to Limit the Use and Disclosure of their Sensitive Personal Information*

The CCPA gives consumers the right to opt out of the sale of their personal information by covered businesses.²⁸ In 2020, the Attorney General adopted regulations to implement consumers’ right to opt out of the selling of their personal data under the CCPA.²⁹ The CPRA now provides for additional rulemaking to update the CCPA rules on the right to opt-out of the sale of personal information, and to create rules to limit the use of sensitive personal information, and to account for other amendments.³⁰

Comments on the following topics will assist the Agency in creating these regulations:

- a. What rules and procedures should be established to allow consumers to limit businesses’ use of their sensitive personal information.³¹
- b. What requirements and technical specifications should define an opt-out preference signal sent by a platform, technology, or mechanism, to indicate a consumer’s intent to opt out of the sale or sharing of the consumer’s personal information or to limit the use or disclosure of the consumer’s sensitive personal information.³²
- c. What technical specifications should be established for an opt-out preference signal that allows the consumer, or the consumer’s parent or guardian, to specify that the consumer is less than 13 years of age or at least 13 years of age and less than 16 years of age.³³
- d. How businesses should process consumer rights that are expressed through opt-out preference signals.³⁴
- e. What businesses should do to provide consumers who have previously expressed an opt-out preference via an opt-out preference signal with the opportunity to consent to the sale or sharing of their personal information or the use and disclosure of their sensitive personal information.³⁵

6. *Consumers’ Rights to Limit the Use and Disclosure of Sensitive Personal Information*

The CCPA gives businesses certain responsibilities, and consumers certain rights, related to consumers’ personal information.³⁶ The CPRA amends the CCPA to give consumers additional rights over a new

²⁶ Civil Code, § 1798.185(a)(8)(A).

²⁷ See Civil Code, § 1798.185(a)(8)(D).

²⁸ See Civil Code, § 1798.120(a).

²⁹ See Code Regs., tit. 11, §§ 999.306, 999.315, and 999.316.

³⁰ See Civil Code, §§ 1798.185(a)(4) and 1798.185(a)(19)–(20).

³¹ See Civil Code, § 1798.185(a)(4)(A).

³² See Civil Code, § 1798.185(a)(19)(A).

³³ See Civil Code, § 1798.185(a)(19)(B).

³⁴ See Civil Code, §§ 1798.135 and 1798.185(a)(20).

³⁵ Civil Code, § 1798.185(a)(20).

³⁶ See, e.g., Civil Code, §§ 1798.100–135.

category of information: “sensitive personal information,”³⁷ and directs the Agency to amend existing regulations and/or issue new regulations to implement these rights.³⁸ These rights include the new right to limit the use and disclosure of sensitive personal information discussed above.

Comments on the following topics will assist the Agency in creating regulations on this topic:

- a. What constitutes “sensitive personal information” that should be deemed “collected or processed without the purpose of inferring characteristics about a consumer” and therefore not subject to the right to limit use and disclosure.³⁹
- b. 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.⁴⁰

7. *Information to Be Provided in Response to a Consumer Request to Know (Specific Pieces of Information)*

When businesses are required to disclose specific pieces of information to a consumer, the CPRA generally requires the disclosure to cover the 12 months prior to a consumer’s request.⁴¹ However, for all information processed⁴² on, or after January 1, 2022, consumers may request, and businesses must disclose, information beyond the 12-month window subject to the exception described in a. below.⁴³

Comments on the following topic will assist the Agency in creating regulations on this topic:

- a. What standard should govern a business’s determination that providing information beyond the 12-month window is “impossible” or “would involve a disproportionate effort.”⁴⁴

8. *Definitions and Categories*

The CCPA and CPRA provide for various regulations to create or update definitions of important terms and categories of information or activities covered by the statute.

Comment on the following topics will assist the Agency in deciding whether and how to update or create these definitions and categories:

- a. Updates or additions, if any, that should be made to the categories of “personal information” given in the law.⁴⁵
- b. Updates or additions, if any, that should be made to the categories of “sensitive personal information” given in the law.⁴⁶
- c. Updates, if any, to the law’s definitions of “deidentified” and/or “unique identifier.”⁴⁷

³⁷ Civil Code, § 1798.121. “Sensitive personal information” is defined in section 1798.140(ae), and includes, for example, social security numbers, information that allows access to a financial account, precise geolocation information, information about race, ethnicity, sexual orientation, religious or philosophical beliefs, and genetic data.

³⁸ See, e.g., Civil Code §§ 1798.185(a)(1), 1798.185(a)(4)(A), 1798.185(a)(19)(A), 1798.185(a)(19)(C), and 1798.185(20).

³⁹ Civil Code § 1798.121(d)

⁴⁰ See Civil Code, §1798.121(a) and § 1798.185(a)(19)(C).

⁴¹ See Civil Code, § 1798.130(a)(2)(B).

⁴² Note that the statute uses the term “collected,” where collect is defined to mean “buying, renting, gathering, obtaining, receiving, or accessing” personal information” and includes “receiving information from the consumer, either actively or passively, or by observing the consumer’s behaviour.” Civil Code, § 1798.140(f).

⁴³ See Civil Code, § 1798.130(a)(2)(B).

⁴⁴ See Civil Code, § 1798.130(a)(2)(B).

⁴⁵ Civil Code, § 1798.185(a)(1).

⁴⁶ Civil Code, § 1798.185(a)(1).

⁴⁷ Civil Code, § 1798.185(a)(2).

- d. Changes, if any, that should be made to the definition of “designated methods for submitting requests” to obtain information from a business.⁴⁸
- e. Further defining the business purposes for which businesses, service providers, and contractors may combine consumers’ personal information that was obtained from different sources.⁴⁹
- f. The changes, if any, that should be made to further define when a consumer “intentionally interacts” with a person.⁵⁰
- g. The changes, if any, that should be made to further define “precise geolocation.”⁵¹
- h. What definition of “specific pieces of information obtained from the consumer” the Agency should adopt.⁵²
- i. The regulations, if any, that should be adopted to further define “law enforcement agency-approved investigation.”⁵³
- j. The regulations, if any, that should be adopted to further define “dark patterns.”⁵⁴

9. *Additional Comments*

Please provide any additional comments you may have in relation to the Agency’s initial rulemaking.

Time for Comments

The Agency invites interested parties to submit comments by [DATE], 2021.

Where to Submit Comments

You may submit comments by the following means: [Submission information to come.]

Contact Person

Questions regarding this invitation for comments may be directed to [Name, title, contact to come].

⁴⁸ Civil Code, § 1798.185(a)(2) (referring to the definition of “designated method for submitting requests” found in section 1798.140(n)).

⁴⁹ See Civil Code, § 1798.185(a)(10).

⁵⁰ Civil Code § 1798.185(a)(12).

⁵¹ Civil Code, § 1798.185(a)(13).

⁵² Civil Code, § 1798.185(a)(14).

⁵³ Civil Code, § 1798.185(a)(17).

⁵⁴ Civil Code, § 1798.140(l)