Comments on the CPRA Rule-Making

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I'm Eric Goldman, a law professor at Santa Clara University School of Law, where I direct the school's Privacy Law Certificate. My blog posts about the CCPA have all featured the "dumpster fire" GIF. I'm still deciding what GIF I'll use with my CPRA posts.

I'd like to start by thanking the agency board members and staff for their hard work on the overwhelming project the voters assigned to it. It's a thankless effort that will garner criticisms on all sides, so I'm grateful for your willingness to serve.

I have two substantive points to make in my limited time, but before that, I want to explain a procedural challenge I had with this hearing. My points relate only loosely to "dark patterns," but there was no better place for my remarks in the hearing's initial taxonomy of topics. I understand the topic taxonomy reflected what the agency wanted to hear about, but it also inhibited participation by leaving no identifiable space for other issues that constituents want to raise. It's a reminder of how easy it can be for a government agency to get so focused on its self-

identified priorities that it may not be receptive to the priorities of its constituents.

My first substantive point relates to the bills in the California legislature proposing to add new duties to the CPPA's remit. I'm baffled by these proposals, because the CPPA's plate is already very clearly full. The CPPA already cannot meet the deliverable schedule approved by the voters, so it's in no position to take on additional projects that would further compromise the CPPA's ability to meet its voter-approved obligations. The CPPA's workload won't get better after the CPPA completes its initial batch of rulemaking. The CPPA will then have the enormous and complex challenge of building an enforcement function from scratch.

Even more bizarrely, some of the legislative proposals have proposed adding non-privacy matters to the CPPA's remit, such as making the CPPA responsible for children's "well-being" under the guise of defining "dark patterns." This scope expansion isn't possible because the CPRA's directives to the CPPA are privacy-specific, so the CPPA lacks the ability to oversee non-privacy topics while still adhering to its voter-mandated directives.

This takes me to my first suggestion. I encourage the CPPA to proactively and emphatically tell the legislature that (1) it cannot take on new privacy matters until it's able to satisfy its existing voter directives, and (2) it will never be in a position to take on non-privacy matters without completely restructuring the CPRA's directives to the CPPA.

My second substantive point is to observe how much of the CPPA's rule-making—indeed, most of the topics covered by these stakeholder sessions—are essentially addressing empirical questions, but we frequently have minimal or no independent empirical research to answer those questions.

As just one example, businesses apparently have been required to honor the Global Privacy Control since AG Becerra tweeted about it in January 2021. How's that going? Are there independent empirical studies of the GPC's costs and benefits since? Is the GPC achieving its purported goals for consumers or not? The CPPA may not know the answers to those questions—but the empirical answers are essential to the efficacy and legitimacy of any further CPPA rulemaking on the topic.

The same is true for any rulemaking on "dark patterns." The CPPA has received a bit of empirical data on the topic, but every detail of any "dark patterns" rule will be predicated on empirically answerable

questions, even if the CPPA doesn't actually rely on empirics when defining those details.

In particular, there has been far too little independent empirical research into the CCPA's efficacy despite the fact that the CCPA has generated substantial field data over the past 2 years. Worse, due to its timing, the CPRA did not incorporate any empirical findings from the CCPA's operation. Given where we are now, it would be very unfortunate to ignore these empirics in the CPRA's rule-making. Without learning from how businesses and consumers are actually behaving in the field, the CPPA could easily misdirect its efforts or possibly make things worse for everyone.

That takes me to my second suggestion. I encourage the CPPA to make explicit any empirical assumptions it's basing its rules on. Then, where the CPPA does not currently have data in hand to support the assumptions it's making, the CPPA should (1) solicit independent researchers to study those empirical questions, and (2) set sunset dates for those rules to ensure they will be reevaluated as new empirical data informs the questions.

The CPPA has an enormous amount of hard work ahead of it, and again I say "thank you" to those of you doing that work.