



August 23, 2022
Brian Soublet
California Privacy Protection Agency
2101 Arena Blvd
Sacramento, CA 95834
regulations@coppa.ca.gov

Re: Proposed Rules to Implement the California Privacy Rights Act

Dear Mr. Soublet,

The California Mortgage Bankers Association (CAMBA)¹ Mortgage Bankers Association (MBA)² and would like to thank the California Privacy Protection Agency (CPPA) for the opportunity to comment on the Agency's proposed regulations (Proposed Regulations), under the California Privacy Rights Act (CPRA). While most of the data our members use is exempted from the act under the Gramm-Leach-Bliley Act (GLBA) exemption, we offer the following feedback to improve the regulation's ability to protect consumers and be implemented consistently and successfully.

Maintaining up-to-date data security practices remains a top priority for the real estate finance industry. Since GLBA passed in 1999, the financial services sector has operated under a comprehensive privacy and data security regime. Protecting personal information is both an existing regulatory requirement and allows MBA members to maintain the trust of their

¹ The California MBA, representing hundreds of companies and tens of thousands of California employees, is the leading advocate for the industry in the largest mortgage/real estate market in the nation. The California MBA represents residential and commercial/multi-family mortgage bankers, as well as their essential vendor partners. The California MBA encourages and promotes sound business practices and honesty in marketing, origination, lending, and servicing of mortgage loans through our educational and networking opportunities.

² The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 330,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 1,700 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

customers. Each year, financial firms expend significant amounts of time and resources to safeguard consumer data, protect data from malicious actors, and defend against adversaries that target financial institutions. Financial institutions develop data security plans, train their front-line employees in best practices, and hire experts to implement protective measures for the mortgage industry.

MBA members already devote a great deal of attention to compliance and data security regulations. These regulations, requirements, and guidelines are enforced by dozens of regulatory bodies exercising overlapping jurisdiction, including but not limited to the Commodity Futures Trading Commission, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Federal Reserve System, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Financial Industry Regulatory Authority, and the Consumer Protection Financial Bureau. Many other data security regulations have been issued in accordance with the GLBA, a law specifically tailored to consider the needs of financial institutions and their customers. GLBA's implementing regulations set uniform requirements with respect to the development and maintenance of comprehensive data security programs. These comprehensive requirements govern all areas of data protection and consumer privacy.

California is the state with the biggest market for mortgage products. This market share leads many states' policy makers to adopt California's standards in those other states. In attempting to emulate California, however, other states may establish a divergent approach. It is important to note that each MBA member company maintains a single technology infrastructure, and not one for each set of state and federal requirements. For these reasons, MBA believes a longer deliberative approach is appropriate here. Many of the agencies listed above are engaged in rulemaking on data security. The CFPB just announced new policies on data privacy, and the FTC is actively engaged in rulemaking on this issue.³ Additionally, Congress is currently debating the American Data Privacy and Protection Act (ADPPA), which would overhaul the current data security regime. As currently drafted, this legislation would strip significantly reduce the rulemaking authority of the CPPA. Given the tumultuous time in both the regulatory space and the mortgage market, we urge caution in developing regulations that may need to be amended quickly or overhauled entirely.

MBA members support strong, uniform data security practices. We ask that the Proposed Regulations create clear and actionable guidelines that will help control compliance costs and protect consumer data. MBA and its member companies would like to encourage the CPPA to consider the following changes to the proposed rules:

- Provide definitive guidance regarding practices related to dark patterns,
- Clarify what must be considered when determining disproportionate effort and,
- Include additional clarity for the "average consumer" standard.

³ Consumer Financial Protection Bureau, Consumer Financial Protection Circular 2022-04, "Insufficient data protection or security for sensitive consumer information" (Aug. 11, 2022), available at <https://www.consumerfinance.gov/compliance/circulars/circular-2022-04-insufficient-data-protection-or-security-for-sensitive-consumer-information/>; Federal Trade Commission, Commercial Surveillance and Data Security Rulemaking (Aug. 11, 2022), available at <https://www.ftc.gov/legal-library/browse/federal-register-notices/commercial-surveillance-data-security-rulemaking>.

Dark Patterns

MBA has some concern related to the lack of specific guidance for dark patterns and how business entities should avoid them when interacting with consumers. Dark patterns are defined in Cal. Civ. Code § 1798.140(l) as, “a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision making, or choice, as further defined by regulation.” Under the definition of consent⁴, use of a dark pattern to obtain consent voids the consent. Section 7004 of the Proposed Regulations specifies that for a business to provide a consumer choice that does not present a dark pattern, the business must present a choice that is easy to understand, offer symmetrical choices, avoid confusing the consumer or using manipulative language, and be easy to execute.

In the Proposed Regulations there is no consideration for the material nature of the item consented to or business intent before voiding consumer consent. Currently, a dark pattern presented to a consumer over any innocuous item can destroy consent for every other piece of information used or collected. Additionally, Section 7004(c) specifically precludes any consideration of business intent. Therefore, a well-meaning business, which inadvertently structures its interface in a manner that could be construed to be a dark pattern to obtain a piece of data for a limited purpose could void consumer consent for the collection of important information related to their financial transaction. This could potentially imperil a consumer home loan if a lender was unable to achieve proper consent due to an unintended mistake that could be alleged to be use of dark patterns.

In addition, this section does not prohibit many specific practices, and instead uses subjective measures with a high level of generality to prohibit practices. The Proposed Regulations refer to standards such as an “easy to understand” interface or language “confusing to the consumer”, which are subjective measures that will change over time. These fact-specific standards also create significant legal uncertainty as they are difficult to define concretely and ripe for subjective application. The regulations should provide more clarity about the specific practices that are prohibited under this section to provide clarity and help prevent inadvertent violations of the CPRA statute and regulations.

Disproportionate Effort

The Proposed Regulations give businesses a defense when complying with consumer requests in Section 7001(h). A business may deny certain requests if complying requires disproportionate effort. This is a measurement of whether the resources and time a business uses to respond to a consumer request significantly outweighs the benefit provided to the consumer by responding

⁴ “Consent” means any freely given, specific, informed, and unambiguous indication of the consumer’s wishes by which the consumer, or the consumer’s legal guardian, a person who has power of attorney, or a person acting as a conservator for the consumer, including by a statement or by a clear affirmative action, signifies agreement to the processing of personal information relating to the consumer for a narrowly defined particular purpose. Acceptance of a general or broad terms of use, or similar document, that contains descriptions of personal information processing along with other, unrelated information, does not constitute consent. Hovering over, muting, pausing, or closing a given piece of content does not constitute consent. Likewise, agreement obtained through use of dark patterns does not constitute consent. Cal. Civ. Code § 1798.140(h).

to that request. Businesses must show that the time and resources needed to execute a request are significantly higher than the material impact on the consumer.

However, this defense relies on subjective or hard to quantify measures that must be disclosed in a factually detailed enough explanation to give consumers a meaningful understanding of the denial. For a business to show that processing a request would require disproportionate effort, they would need to retain many documents on measures that are difficult to quantify. For example, how would a company quantify the “time and or resources” required to complete a request, especially in cases where it is not clear from an initial review how to comply with a request. It is not clear how a business would measure the benefit or material impact to the customer, especially when the reason for the request is not known. Making a business determine the material impact to consumers is a vague and subjective task, requiring the business to read the mind of the consumer. In addition, a factual and detailed denial would have to include an explanation of a financial institution’s technical processing platform. Giving this level of detailed information will both confuse consumers and could force financial institutions to disclose trade secrets.

This balancing test is further complicated by the example the CPPA uses in the Proposed Regulations. The example given of a request that would require disproportionate effort is one in which denying the request “would not impact the consumer in any material manner.” This potentially creates confusion and does not show the tradeoffs businesses are supposed to consider when making this decision. If this is the median case, then this provision is not a balancing test and would require businesses to process a request unless there is no material impact to the consumer. The CPPA should consider providing additional clarity in how to effectively balance these conditions to make the proper compliance decisions.

This defense is intended to allow businesses to prioritize their resources towards answering requests from consumers in need. As written, much time and many resources will need to be spent answering cumbersome or unnecessary requests. We ask for more particularity so our members can prioritize the consumers this Proposed Regulation is intended to help.

“Average Consumer” Standard

The Proposed Regulations tailor several requirements according to an “average consumer” standard and what that potential individual would expect. Although this is a commonly used legal standard, there needs to be additional clarity in the proposed rules because of the quickly evolving nature of technology. As new technology emerges, the average consumer’s expectation will change over time. However, it is hard to know what the “average consumer” can expect given wide variance in technological capacities and literacy across the general population.

There are other problems with creating a regime based on consumer’s expectations. A first party is defined as, “the consumer-facing business with which the consumer intends and expects to interact.” This definition is meant to distinguish first parties from third parties. Defining first parties according to consumer expectation raises problems, especially in the mortgage context. For instance, it is not clear if the average consumer knows that servicers and not the originating lenders are responsible for facilitating loan default. The CPRA places different duties on parties

depending on these categories. Creating a regulatory regime based on shifting or factually incorrect consumer beliefs only creates confusion and regulatory risk for businesses.

Once again, thank you for providing us with the opportunity to comment on the Proposed Regulations. Our association welcomes the opportunity to engage with you further to develop California's data privacy regulations. If you have any questions, please contact Kobie Pruitt (kpruitt@mba.org or 202-557-2870).

Respectfully,



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