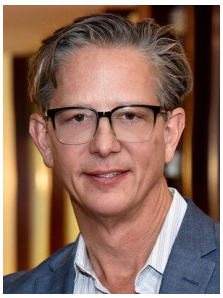
The Problems In Calif. Draft Behavioral Ad Privacy Regs

By **Alan Friel and Kyle Fath** (March 7, 2024)



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The California Privacy Protection Agency has been working for many months on regulations that set forth how automated decision-making technology and profiling will be regulated under the California Consumer Privacy Act, or CCPA, and has recently released an updated draft of proposed rules.

These regulations will likely prove to be extremely consequential in many respects, including, possibly most notably, the fact that they would be the broadest and most sweeping attempt at regulating artificial intelligence in the U.S. to date. That fact will — and should — be the subject of significant coverage.

However, this op-ed focuses on the agency's proposed treatment of behavioral advertising and how it diverges from the fundamental principle underlying its treatment of automated decision-making technology generally, to regulate use of such technology "for a significant decision concerning a consumer."

Additionally, it will focus on how the proposal diverges from the approach of regulating data-driven advertising taken in a dozen other states, and how this will increase compliance burdens and costs for businesses of all types, regardless of the extent of their advertising activities or online operations without significant benefit to consumers.

The analysis below also identifies a practical path for the agency to enhance the rights and choices of Californians without creating unnecessary consumer confusion or overregulating automated decision-making technology ahead of the California Legislature's current efforts to do so.

Through these draft regulations, which the agency will be considering during its March 8 meeting, the agency seeks to expand how California regulates digital marketing and advertising practices with a new concept of "behavioral advertising."

It does so by treating behavioral advertising as extensive profiling, which is treated as the equivalent of a "significant decision … that results in access to, or the provision or denial of, financial or lending services, housing, insurance, education enrollment or opportunity, criminal justice (e.g., posting of bail bonds), employment or independent contracting opportunities or compensation, healthcare services, or essential goods or services (e.g., groceries, medicine, hygiene products, or fuel)."[1]

This is simply a false equivalent. It also conflicts with current proposed California legislative efforts to regulate automated decision-making technology in connection with "consequential decisions."[2]

Further, the agency's current approach deviates significantly from the current CCPA and privacy laws in more than a dozen other states. If promulgated, these regulations will create significant costs and compliance burdens for virtually all companies, from those with a minimal online presence to technology platforms with millions of daily active users, and in

particular those whose bottom line depends on digital advertising to help maintain a free and open Internet and digital democracy.

Instead of continuing down this current path, the agency should take the opportunity to use automated decision-making technology rulemaking to raise the level of California consumer protection from what the CCPA currently requires, but to do so in a manner that aligns its approach to the "targeted advertising" concept that exists under a dozen other states' privacy laws.

Any further regulation of automated decision-making technology in the context of marketing should be left to the Legislature. In addition, other shifts in the agency's approach are necessary to align its automated decision-making technology regulations with well-established concepts in the CCPA and to avoid consumer confusion.

The 2020 ballot initiative known as the California Privacy Rights Act amended the CCPA to address automated decision-making technology and profiling, but left it largely to the CPPA to issue regulations "governing access and opt-out rights with respect to businesses' use of automated decision making technology, including profiling."

At the onset of its efforts to regulate automated decision-making technology, the CPPA staff presented a set of draft regulations for discussion late last year which first introduced the concept of profiling for purposes of behavioral advertising. While seemingly intended to be broader than the CCPA's current term, "cross-context behavioral advertising," or CCBA, the agency's initial draft left this new term undefined, and it was unclear if a legal or similarly significant effect on the consumer was necessary before behavioral advertising triggered automated decision-making technology notice and opt-out requirements.

In advance of the March 8 meeting of its board, the CPPA released a further set of draft rules[3] that the CPPA Board is set to consider for publication for public comment, where approval by the board would advance the official rulemaking process.

This draft does provide a definition of behavioral advertising, deems it the equivalent of use of automated decision-making technology to make significant decisions concerning a consumer, or "extensive profiling," and provides detail on both the pre-use notice requirements associated with this and other automated decision-making technology, along with opt-out rights.

It seems that the agency's intent is to expand the CCPA's opt-out rights related to data-driven advertising — beyond the right to opt out of sharing personal information with third parties for cross-contextual behavioral advertising — to internal processing activities for such purposes, which notably is covered by the dozen or so other state laws' targeted advertising-related opt-outs.

This would increase protection of California consumers and create harmonization with the other state laws. Unfortunately, however, the CPPA's proposed approach to behavioral advertising goes beyond meeting that intent and diverges drastically from the targeted advertising approach taken elsewhere.

This misalignment will result in significant expansion of California-specific compliance obligations and an increase in compliance costs due to the application of differential online user experiences and privacy rights based on state residency. To avoid this, the CPPA should align its treatment of behavioral advertising with the other states' concept of targeted advertising, and should even consider using the same nomenclature to increase

consumer comprehension.

The states that regulate targeted advertising provide an opt-out of any processing of personal information for purposes of advertising that mixes personal data collected online from first-party data collected by the business itself and third-party sources.

This right extends to wholly internal processing of personal information for purposes of targeted advertising, such as categorizing website visitors as interested in a particular product and deciding to place them in a segment or audience indicating such interest — having an ad for that product served to these individuals on a third-party site would then typically be done by a third party and involve the use of third-party data.

The CCPA's advertising-specific opt-out concept of "do not share for CCBA" only addresses the disclosure of personal information to third parties for targeted advertising purposes, but does not extend to businesses' internal processing activities for targeted advertising purposes. Most, if not all, of the states that regulate targeted advertising also include exceptions for advertisements based on certain first-party data, such as advertisements based on the activities and data collected within a company's own websites and applications, as well as for contextual advertising.

This type of multisource tracking and targeting, because it is fairly intrusive and for some consumers unexpected, is far more logically extensive profiling that materially affects a consumer than use of first party data for first party recommendation purposes.

The proposed definition of behavioral advertising and the corresponding opt-out right do extend to internal processing activities like those just described above. However, they go far beyond that, and would extend a business's use of its own personal information for any customized offer, advertisement, suggestion or communication of any kind to a consumer to induce or encourage the consumer to obtain goods, services or employment.

This is so broad that it would seemingly capture, for instance, e-commerce recommendation engines that create a more efficient shopping experience, e.g., suggested products, sales you might be interested in, etc. Such a material divergence from the other states will require many businesses to have different user experiences for California consumers, and create more consumer confusion as to what rights they have and how to exercise them.

Finally, the CPPA's draft automated decision-making technology regulations do not account for, and are not drafted around, other concepts in the CCPA, such as the value exchange contemplated in the financial incentive concept. In short, the current CCPA regulations allow for discrimination in the privacy law sense, such as providing a different level or goods or services, if a user opts out of sale or sharing — subject to meeting certain requirements.

Without accounting for these provisions, and adding confusing language about banning retaliation, the automated decision-making technology regulations as drafted make compliance with the CCPA likely unworkable for consumer-facing businesses that collect personal information and provide benefits in exchange for doing so.

The CPPA has repeatedly stated that one of its goals is to try to create compatibility with similar regulations that had already been promulgated by Colorado. Unfortunately, it has failed to do so with respect to the behavioral advertising concept it is proposing, and threatens to widen, not narrow, the gulf between California's approach to consumer privacy and that of a dozen other states, including Colorado, which has already finalized automated decision-making technology and profiling regulations.

This is particularly the case with data-driven advertising, and if the CPPA does not rework its approach to more closely match that of the other states it will create market inefficiencies by driving up costs for business and, of even more concern, increasing consumer confusion. The agency also is getting ahead of the legislature on this issue and should refrain from doing so.

In summary, there are several things the CPPA should consider addressing in its proposed treatment of behavioral advertising, such as:

- In its designation of behavioral advertising as "extensive profiling" that is the equivalent of "a significant decision concerning a consumer," the agency should align definitions and corresponding business obligations and consumer rights with the concept of targeted advertising that is present in other states' privacy laws, but not go beyond that as to first-party data.

- Whether or not notice and opt-out rights for automated decision-making technology that facilitates significant decisions concerning a client should be extended to behavioral advertising use of personal information, including first party data, to market essential goods or services, should be left to the legislature.

- The pre-use notice provisions proposed in draft Section 7220 are far too burdensome, especially as relates to behavioral/targeted advertising. For instance, the regulations could clarify that including notices on a splash page behind the "Your Privacy Rights" link would be sufficient. Otherwise, the CPPA risks creating unworkable, confusing and disruptive pop-up notices that consumers ignore — some have dubbed this as "consent fatigue" which is particularly pervasive among European consumers. Material notices regarding opt-out rights of various kinds will be most effective if located in a single place.

- Rather than apply the CCPA's restriction on discrimination, which has exceptions in Sections 7080 and 7081 of the regulations for differential treatment based on a reasonable value basis, the current draft uses the term "retaliation," which is undefined and arguably not subject to the same carveouts — which would exceed the CPPA's regulatory authority. The references to retaliation should be changed to discrimination and applicable regulations, including Sections 7080 and 7081, should be amended to account for automated decision-making technology opt-outs.

- The proposed restrictions on profiling through observation in a "publicly accessible place" should be clarified to specifically exclude virtual places such as websites and mobile apps. The behavioral advertising regulation addresses tracking online, and if virtual places were included the broad definition of profiling would capture more than

behavioral/targeted advertising, such as internal improvement of the service, unless additional exceptions were added to the opt-out exceptions in draft Section 7221(b).

- Add a carveout to the obligation for opt-out of behavioral advertising when a consumer has directed the business to provide such services, similar to the exclusion from CCBA in the carveout of user directions from the concept of "share."[4]

The CPPA has an opportunity with its automated decision-making technology and profiling rulemaking to harmonize California's regulation of data-driven advertising with the majority approach as to targeted advertising and thereby increase California consumer rights.

If it fails to do so and strikes the radically divergent path that it is considering, business costs and consumer confusion will increase. It will also create complex compliance obligations for businesses — particularly publishers, retailers and advertisers — that will require drastically different consumer experiences for California residents than are required for residents of other states with comprehensive consumer privacy laws.

Any arguable gains in consumer protection would be offset by increase in consumer confusion and the cost of doing business.

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[1] February 2024 Discussion Draft Sections 7200(a)(2)(iii); 7220; and 7221.

[2] AB 290, introduced February 15 by Assembly Member Bauer-Kahn, would amend the Unruh Civil Rights Act to regulate ADMT that is used for "consequential decisions" that "means a decision or judgement that has a legal, material, or similarly significant effect on an individual's life relating to access to government benefits or services, assignments of penalties by government, or the impact of, or costs, terms, or availability of any of the following: …employment…education…housing…family planning...healthcare…financial services…legal service…private arbitration…mediation…[or] voting." See https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB2930.

[3] https://cppa.ca.gov/meetings/materials/20240308.html.

[4] See CCPA Section 1798.40(ah)(2)(A).