



Perspectives from FSF Scholars
May 27, 2020
Vol. 15, No. 26

California Privacy Regulation Must Account for the COVID-19 Crisis

by

Andrew Long *

Introduction and Summary

Two years ago, Californians for Consumer Privacy, an advocacy group "dedicated to protecting and expanding privacy rights for consumers," collected a sufficient number of signatures to qualify its proposed privacy legislation for the November 2018 ballot. That prompted passage by the California legislature of the California Consumer Protection Act (CCPA), which went into effect at the beginning of 2020. The California Attorney General intends to begin enforcing the CCPA on July 1, even though his office has yet to finalize implementing rules. These efforts in California to enforce more stringent privacy restrictions are problematic in any event. But now, in light of the serious harm to the economy caused by the COVID-19 pandemic, they almost certainly will be even more harmful.

As a result of the COVID-19 pandemic, businesses struggle to keep their doors open. The necessary reallocation of resources to efforts to interpret, and comply with, unsettled obligations only makes that more difficult. Online commerce, motivated and informed by online advertising, serves as one bright spot in an otherwise bleak landscape. But onerous regulations that restrict the ability to use personal information for marketing purposes threaten to undermine its continued ability to do so.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

Nevertheless, despite the struggling economy, Californians for Consumer Privacy is now actively advancing a second ballot initiative that would further constrain online advertising, well before the impact of the CCPA can be understood. This is an unprecedented moment, one that calls for a recognition that, at least for the foreseeable future, the world has changed. What is needed now is a cautious appraisal of the evolving "new abnormal," a laser focus on reinvigorating economic growth through increased consumption, and an appreciation of the critical role that online commerce can play in spurring economic activity. It certainly is not the time for additional restrictions that are not just bad policy, but that also would undermine marketing's ability to help our nation get back on its financial feet.

The CCPA itself imposes an unprecedented, untested, and sweeping set of costly burdens on the online advertising marketplace. California's political leadership should delay enforcement of its provisions until after final implementing rules are in place and businesses have had an adequate opportunity to put in place compliance measures. And privacy advocates should heed the evolving bigger picture – in particular, the impact that the CCPA will have on overall consumer welfare in the context of our transformed reality.

Online Commerce Is Critical to Economic Recovery, but Uncertainty and Regulation Threaten Its Effectiveness

The novel coronavirus upended life in America seemingly overnight. Fundamental questions regarding the extent to which it will alter forever the ways we work, learn, interact socially and engage in economic activity loom large. But in the short-term, at least, the economic fallout will be vast: California Governor Gavin Newsom recently announced that the state is facing a \$54 billion budget deficit that is a "direct result" of the current crisis.¹ And according to a Facebook survey, up to one-third of closed businesses may not ever reopen.²

Moving forward, the number one priority must be the rapid and safe reinvigoration of the economy. Confident and informed consumer consumption is key to the successful and timely achievement of that goal. Online commerce can serve as the socially distant accelerant: as that same Facebook study notes, in response to the current crisis over one-third of businesses have moved all of their operations online.³ I argued in an April 30 *FSF Perspectives* that Xavier Becerra, California's Attorney General, would be wise to delay enforcement of the overreaching CCPA, which is scheduled to begin on July 1.⁴ Voters' self-interests likewise best would be served by their rejection of privacy activists' ill-timed efforts to layer additional restrictions upon the online advertising marketplace.

¹ Chandelis Duster, "Newsom says California budget deficit is a direct result of Covid-19," *CNN* (May 17, 2020), available at <https://www.cnn.com/2020/05/17/politics/gavin-newsom-california-budget-deficit-coronavirus-cnntv/index.html>.

² Lauren Feiner, "Coronavirus devastating small businesses: One-third won't reopen, 55% won't rehire same workers, Facebook survey finds," *CNBC* (May 18, 2020), available at <https://www.cnbc.com/2020/05/18/facebook-survey-details-coronavirus-small-business-devastation.html>.

³ *Id.*

⁴ See Andrew Long, "State Online Advertising Laws: Wrong Policies, Wrong Time," *Perspectives from FSF Scholars*, Vol. 15, No. 22 (April 30, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/04/State-Online-Advertising-Laws-Wrong-Policies-Wrong-Time-043020.pdf>.

The state of California allows its citizens "to propose laws and constitutional amendments without the support of the Governor or the Legislature."⁵ In 2018, Californians for Consumer Privacy provoked the state legislature to pass the CCPA with its first ballot initiative. In September 2019 – that is, well before the current public health crisis – it began that process again, this time to place the California Privacy Rights Act of 2020 (CPRA),⁶ commonly known as the CCPA version 2.0, on the November 2020 ballot.⁷ On May 4, it announced that it has collected sufficient signatures to do so.⁸ Polling seems to suggest that, should the CPRA be put before California voters this fall, it would pass.⁹ As discussed below, the CPRA would further impede online advertising by, among other things, defining a new category of data, creating additional consumer privacy rights, increasing certain penalties, and establishing a new agency. And it would do so at the worst conceivable time.

Sensitive Personal Information: The CPRA would expand upon the CCPA by establishing a new category of personal data: *sensitive* personal information. "Sensitive personal information" is defined as a subset of "personal information" that includes social security, driver's license, and passport numbers; debit/credit card numbers and other information used to access financial accounts; precise geolocation information; racial or ethnic origin, religious beliefs, or union membership; the contents of mail, email, and text messages; genetic information; biometric data used to identify an individual consumer; and information concerning a consumer's sex life or sexual orientation.¹⁰

Businesses would be required to provide notice to consumers that (1) their sensitive personal information may be used or disclosed, and for what specific purposes, and (2) they at any time

⁵ State of California, Department of Justice, Office of the Attorney General, "Ballot Initiatives," available at <https://oag.ca.gov/initiatives>.

⁶ See The California Privacy Rights Act of 2020, available at https://oag.ca.gov/system/files/initiatives/pdfs/19-0021A1%20%28Consumer%20Privacy%20-%20Version%203%29_1.pdf (CPRA).

⁷ See "A Letter from Alastair Mactaggart, Board Chair and Founder of Californians for Consumer Privacy" (September 25, 2019), available at <https://www.caprivacy.org/a-letter-from-alastair-mactaggart-board-chair-and-founder-of-californians-for-consumer-privacy/>.

⁸ See Californians for Consumer Privacy Press Release, "Californians for Consumer Privacy Submits Signatures to Qualify the California Privacy Rights Act for November 2020 Ballot" (May 4, 2020), available at <https://www.caprivacy.org/californians-for-consumer-privacy-submits-signatures-to-qualify-the-california-privacy-rights-act-for-november-2020-ballot/>.

⁹ See Jim Halpert & Lael Bellamy, "US: CPRA Analysis: the 'Good' and 'Bad' News for CCPA-Regulated Businesses," *Privacy Matters* (May 11, 2020), available at <https://blogs.dlapiper.com/privacymatters/us-cpra-analysis-the-good-and-bad-news-for-ccpa-regulated-businesses/#page=1> (noting that "the CPRA's presence on the ballot is still not a 'done deal'" and reporting that "[e]arly polling strongly suggests that if the CPRA – aka CCPA 2.0 – is certified for the ballot, it will pass and become effective Jan. 1, 2023"). See also Californians for Consumer Privacy Press Release, "Californians for Consumer Privacy Submits Signatures to Qualify the California Privacy Rights Act for November 2020 Ballot" (May 4, 2020), available at <https://www.caprivacy.org/californians-for-consumer-privacy-submits-signatures-to-qualify-the-california-privacy-rights-act-for-november-2020-ballot/> (claiming that, according to Goodwin Simon Strategic Research polling, nearly 90 percent of Californians "would vote YES to support a ballot measure expanding privacy protections for personal information").

¹⁰ See CPRA § 14 (adding § 1798.140(ae) to the CA Civil Code). "Sensitive personal information" excludes "publicly available" information. See *id.* (revising § 1798.140(o)(2) of the CA Civil Code to exclude "publicly available information or lawfully obtained, truthful information that is a matter of public concern" from the definition of "public information" set forth in subsection (o)(1)) (emphasis added).

may opt out of the use or disclosure of their sensitive personal information.¹¹ To facilitate the latter, businesses would have to add a "Limit the Use of My Sensitive Personal Information" link to their websites.¹² This is in addition to the "Do Not Sell My Personal Information" link already required by the CCPA.

Right to Correct: As I explained in an October 28, 2019, *FSF Perspectives*,¹³ the CCPA established a number of new consumer rights: the right to know, the right to delete, the right to opt-out of sale, and the right to non-discrimination. In addition to the right to limit the use of sensitive personal information noted directly above, the CPRA would add the right to correct inaccurate personal information to that list.¹⁴

Right to Data Minimization: Another new consumer right, businesses would have to disclose for how long they will retain personal information – and would be prohibited from retaining that data "for longer than is reasonably necessary."¹⁵

Increased Fines for Violations Implicating Children's Data: The CPRA would triple the fines imposed for failing to obtain opt-in consent before selling the personal data of consumers under the age of 16, from \$2,500 to \$7,500.¹⁶

New State Bureaucracy: The CPRA would create the California Privacy Protection Agency and authorize it to: assume rulemaking responsibilities from the Attorney General's office; "administer, implement, and enforce" the amended CCPA through administrative proceedings; appoint a Chief Privacy Auditor; investigate and conduct hearings regarding possible violations; issue cease and desist orders; and impose fines.¹⁷ The CPRA allocates to the agency's budget a minimum of \$5 million from the state General Fund in fiscal year 2020-21 and \$10 million every year that follows.¹⁸

I should point out, however, that the CPRA does include some provisions that covered businesses may welcome.¹⁹ These include: extending until 2023 the date by which the CPA's

¹¹ See CPRA § 10 (adding § 1798.121 to the CA Civil Code).

¹² See CPRA § 13 (adding subsection (a)(2) to § 1798.135 of the CA Civil Code).

¹³ See Andrew Long, "California's Heavy-Handed Approach to Protecting Consumer Privacy: Exhibit A in the Case for Federal Preemption," *Perspectives from FSF Scholars*, Vol. 14, No. 35 (October 28, 2019), available at <https://freestatefoundation.org/wp-content/uploads/2019/10/California's-Heavy-Handed-Approach-to-Protecting-Consumer-Privacy—Exhibit-A-in-the-Case-for-Federal-Preemption-102819.pdf>, at 3-4.

¹⁴ See CPRA § 6 (adding § 1798.106 to the CA Civil Code).

¹⁵ See CPRA § 4 (adding subsection (a)(3) to § 1798.100 of the CA Civil Code).

¹⁶ See CPRA § 17 (revising § 1798.155(b) of the CA Civil Code).

¹⁷ See generally CPRA § 24 (adding §§ 1798.199.10 *et seq.* to the CA Civil Code).

¹⁸ See CPRA § 24 (adding § 1798.199.95(a) to the CA Civil Code).

¹⁹ See generally Jim Halpert & Lael Bellamy, "US: CPRA Analysis: the 'Good' and 'Bad' News for CCPA-Regulated 'Businesses,'" *Privacy Matters* (May 11, 2020), available at <https://blogs.dlapiper.com/privacymatters/us-cpra-analysis-the-good-and-bad-news-for-ccpa-regulated-businesses/#page=1>.

provisions apply to employees and job applicants;²⁰ expanding the exemption for small businesses;²¹ and making clear that reward (*e.g.*, club card) programs are permissible.²²

But on balance, it is clear that neither businesses nor the self-interests of California consumers would be served by this proposed privacy legislation, particularly at a time when online advertising otherwise could facilitate a rapid recovery from the current, pandemic-driven economic downturn.

Conclusion

After Californians for Consumer Privacy qualified its ballot referendum in 2018, the state legislature reacted by rushing through the CCPA in mere days.²³ The resulting uncertainty and confusion can be traced directly back to that hurried process. The CCPA became law over four months ago, but affected businesses still have not been provided final rules. In the intervening period, the economy has been decimated by the COVID-19 pandemic. And yet the march to restrain online advertising goes on. State Attorney General Becerra apparently still intends to begin enforcement on July 1, even if those rules remain pending. And Californians for Consumer Privacy continues its push to impose ever greater restrictions through a second ballot initiative.

The current moment instead demands prudence – not another privacy law. Californians would benefit from a pause to appreciate how our economy will perform during and after the recovery. An opportunity to allow online commerce, a bright spot in the current downturn, to drive that rebound. Sufficient time to allow the Attorney General's office to finalize rules, and for companies to develop responsive compliance measures. And an adequate period to monitor and evaluate the consequences, intended and not, that result from the CCPA and those implementing rules.

In order for the CPRA to appear before voters in November, by June 25 at least 675,000 submitted signatures must be certified by county election officials and the California Secretary of State. June 25 also is the last day on which Californians for Consumer Privacy might reconsider and withdraw its ballot initiative.²⁴ In other words, within a month we can expect more clarity

²⁰ See CPRA § 15 (adding subsection (m)(4), which extends this exemption until January 1, 2023, to § 1798.145 of the CA Civil Code).

²¹ See, *e.g.*, CPRA § 14 (revising the definition of "business" in § 1798.140(c) by raising the minimum threshold from 50,000 to 100,000 consumers or households).

²² See CPRA § 11 (adding subsection (a)(3), which states that "[t]his subdivision does not prohibit a business from offering loyalty, rewards, premium features, discounts, or club card programs consistent with this title," to § 1798.125 of the CA Civil Code).

²³ John Stephens, "California Consumer Privacy Act," *American Bar Association* (February 14, 2019), available at https://www.americanbar.org/groups/business_law/publications/committee_newsletters/bcl/2019/201902/fa_9/.

²⁴ See Sharon R. Klein, *et al.*, "CCPA 2.0 Initiative Signatures Submitted for November 2020 Ballot," *Power of Intelligence* (May 8, 2020), available at <https://www.pepperlaw.com/publications/ccpa-20-initiative-signatures-submitted-for-november-2020-ballot-2020-05-08/?announcement=close>.

regarding the possibility of even greater restrictions on the online advertising marketplace. Sadly, unless California reverses course, we also can expect that the CCPA and the Attorney General's implementing rules will exacerbate the harm already wreaked by the COVID-19 pandemic.

* Andrew Long is a Senior Fellow of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.