NetChoice Comments to the California Privacy Protection Agency:

Proposed Regulations on CCPA Updates: Automated Decisionmaking Technology

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January 14, 2025

Introduction

NetChoice[1] is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of internet business models. Our mission is to make the internet safe for free enterprise and free expression.

We work to promote the integrity and availability of the global internet and are significantly engaged in the states, in Washington, and in international internet governance organizations.

NetChoice appreciates the opportunity to respond to the California Privacy Protection Agency's (CPPA) proposed regulations. We will focus particularly on rulemaking related to Automated Decisionmaking Technology (ADMT), as it is of particular interest to the burgeoning artificial intelligence (AI) sector and is beyond the legal scope of the CPPA's authority. While we disagree with most of the proposed regulations offered by the CPPA, we recognize the importance of this conversation and stand willing to engage with any interested parties moving forward.

Privacy is an incredibly challenging and vital area for policy making. It is important to consumers and carries with it significant trade-offs. Privacy legislation has presented such a challenge that the federal government has remained largely paralyzed even while there has been bipartisan interest to act. That is in part why the United States is currently governed by a patchwork of state-led data privacy statutes. This includes California. Before we launch into the specifics of the NPRM, NetChoice wishes to reiterate our belief that the only productive, genuinely protective path forward is a single, preemptive, federal data privacy law. Anything less invites untold layers of confusing and conflicting regulation.

Advocating for a streamlined privacy regime is not simply pro-business. Ultimately, a privacy framework is only successful if it is accessible to the consumers that rely on it. The rights or benefits that a framework bequeath to the consumer must be easy to understand and, ideally, travel with them wherever they go. Likewise, the easier for businesses of all sizes a privacy law is to comply with, the more empowered consumers actually are. A privacy labyrinth, one that this NPRM would expand, undermines the goal of improving outcomes for California consumers.

[1] The views expressed here do not necessarily represent the views of every NetChoice member company.

AI is Already Regulated

While some have called for extensive new regulations on AI, including the proposals in this NPRM, the reality is that this technology is already subject to a wide array of existing laws and regulatory frameworks. Any AI system must comply with the same rules as any other technology or business practice in its sector. This means that AI applications in healthcare are regulated by HIPAA and FDA guidelines, AI in finance is subject to FCRA and ECOA, and AI in education must adhere to FERPA. The notion that AI will inhabit some kind of lawless Wild West is simply false.

Additionally, the federal government has already made intentional lying about the time, manner, or place of an election to prevent qualified voters from voting a crime. This means the government is free to go after individuals publishing deepfakes that seek to subvert election integrity. Moreover, existing consumer protection laws, such as the FTC Act's prohibition on unfair and deceptive practices, already provide robust safeguards against AI systems that might mislead consumers or otherwise cause them harm.

To be clear, this is not to say that every conceivable AI harm is perfectly addressed by current law, or that thoughtful, targeted updates may not be warranted in certain areas. But the core frameworks for regulating the responsible development and use of AI are very much in place today. Policymakers and the public can take comfort in the fact that our existing legal structures are, by and large, well-equipped to prevent and remedy the highest-risk AI failures.

At the end of 2024, the Bipartisan House Task Force on AI (House Task Force) released a wide-ranging report.[2] This bipartisan group of legislators had been tasked by Speaker Johnson and Leader Jefferies with promoting the development of American AI while accounting for potential harms. The report is striking not simply for its bipartisan tone and substance but because of its regulatory humility. It calls for a restrained, incremental and sectoral approach to regulating AI while avoiding sweeping regulatory regimes like the one being considered here by the CPPA. We highly recommend that anyone interested in AI policymaking read the task force report in its entirety and we will address the report further in this comment.

Before rushing to pass sweeping new AI-specific regulations, we should think carefully about how they would interact with this dense, overlapping web of existing rules. The goal should be to strategically fill discrete gaps, not to create a redundant layer of AI law that could impede innovation while adding marginal protection for the public.

[2] Bipartisan House Task Force Report on Artificial Intelligence (report), December 2024

Overbroad Definitions Harm Consumers

In the NPRM, the CPPA defines ADMT as "any technology that processes personal information and uses computation to execute a decision, replace human decisionmaking, or substantially facilitate human decisionmaking." This is, to put it plainly, a catastrophically unsophisticated definition of the types of technology that the CPPA wishes to capture under its proposed regulatory framework.

The House Task Force, in the segment of its AI report entitled "Data Privacy," calls for continued "access to privacy-enhanced data" and demands Congress act in a "technology-neutral" way."[3]

The CPPA proposes to break any sort of technologically neutral posture here. It identifies AI, particularly and peculiarly defined, as a specific target, as opposed to identifying and mitigating against specific harms. In doing so, the CPPA fails to recognize AI for what it is: a broad marketing term that encompasses many different, independent technologies. By breaking neutrality and casting a wide net, the CPPA would begin regulation of a virtually unknowable number of technologies and applications. Under the proposed definition of ADMT, an excel spreadsheet being used by a local accounting firm could rather easily qualify. Instead of protecting the privacy of California citizens, this proposed language is far more likely to burden small companies, drive more job creators out of the state, and make cutting edge AI goods and services less beneficial to consumers.

The NPRM also provides an overbroad definition for a new legal term of art: "behavioral advertising." While existing privacy legislation has dealt with the sharing of customer data across platforms or advertisers, this would be a novel attempt to restrict the use of customer data to advertise to **one's own customers**. To be clear, this appears to be an attempt to undermine, if not outright eliminate, first-party advertisement. That would mean businesses would struggle to advertise on their own sites, about their own products, to their own customers who are choosing to shop with them. Such a vague definition of "behavioral advertising" is a striking burden on commercial speech protected by the Constitution. It should be made clear that such a regulation very likely violates the First Amendment and would be ripe for challenge if enacted.

It should also be noted that such a regulation would in no way benefit California consumers. A move by the CPPA to undermine online advertising would instead harm internet users. If enacted in the extreme, and first-party advertising was genuinely impaired, many online platforms would have to be entirely reworked, likely leading to

[3] Bipartisan House Task Force Report on Artificial Intelligence, December 2024, page 38

negatively impacted services and a degraded customer experience. Even if some middle ground is struck, how is a consumer better off when a store they trust can't let them know about products or deals relevant to them?

Advertising alerts consumers to better deals, products they are interested in, and helps to make many services across the internet ecosystem affordable or lower cost. Undermining that system is a de facto tax on every single Californian. That is in addition to the reported cost of the NPRM: $3.4 billion while affecting 52,326 businesses.[4] The impact statement also recognizes that the proposed changes will make California businesses less competitive compared to out-of-state competitors and may drive some businesses out of the state.[5] Small businesses and taxpayers can't afford that type of destructive regulation.

Beyond CPPA's Authority

What is notable about much of the NPRM related to ADMT is its focus on issues peripheral to privacy. The CPPA, like any other government entity, possesses a limited scope of authority. It cannot reimagine that authority as new issues become interesting to it. This is especially true of burgeoning technologies or policy choices where the side-effects could be economically calamitous.

The attempt to regulate general computation, defined as ADMT, is straightforwardly outside the plain text of CPPA's mandate. It is hard to imagine that even the most aggressive champion of the agency would understand its authority to encompass nearly all technology and applications of those technologies from the past half century. To avoid this pitfall, the CPPA should avoid weighing in on specific technologies and, as stated previously, focus instead on particular consumer harms to privacy.

The provisions related to advertising are similarly fraught. Again, advertising is not listed in statute amongst the sort of regulations the agency is invited to construct.[6] Moreover, this type of advertising regulation is expressly at odds with the CPPA's statutory authority. The framework enacted by the California Consumer Privacy Act gave California consumers the right to opt-out of certain cross-context behavioral advertising while allowing other types of advertising, like first-party and contextual. This change would go beyond CPPA's express authority and upend a significant portion of the digital economy.

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[4] Economic and Fiscal Impact Statement
[5] Ibid
[6] Cal. Civ. Code §1798.185

Conclusion

NetChoice remains dedicated to improving the privacy landscape for all Americans. We have consistently called for robust, comprehensive data privacy legislation at the federal level and we remain confident that such an approach remains the best option available to policymakers.

A strong privacy regime should not, however, undermine the competitiveness of small businesses, the buying power of California consumers, or diminish the innovative potential of America's free market economy. AI has been around for a long time, but many of the applications are new and will present unique challenges. Many of those challenges will be easily addressed by existing law but a few of them will require new policy solutions. We should not lose sight of the fact that AI may also be the solution to many privacy-related concerns. Hamstringing potential solutions in the name of privacy would be a disappointing, if not fitting outcome for the regulatory process.

As the legislature in California as well as the Congress in Washington continue to litigate the intersection of privacy and AI, we respectfully ask that the CPPA exercise regulatory humility and avoid some of the more onerous regulations proposed in the NPRM. Again, we appreciate the opportunity to participate in this process and are happy to discuss our concerns with you further.