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Dear California Privacy Protection Agency Board Members and Executive Director:

On behalf of the ANA – Association of National Advertisers ("ANA") – we write to express our significant concerns with the proposed draft regulations released on May 27, 2022 to implement the California Privacy Rights Act of 2020 ("CPRA").

While we welcome the release of draft regulations for public comment, we are deeply concerned that the proposed draft regulations would substantially and materially alter the statutory requirements in the text of the CPRA itself, thus substituting a regulator's extra-legislative objectives for the specific language of the law. It is vital that the implementing regulations be promulgated within the legal authority granted to the California Privacy Protection Agency ("Agency").

We recognize that the proposed regulations are in "draft" form, however, we strongly believe that several of the proposed draft rules are *ultra vires* and contravene the law by creating requirements that are significantly different from, and in some cases diametrically opposed to, the requirements set forth in the CPRA. We look forward to providing more detailed comments through the rulemaking process, but we believe it is vital to raise our concerns with respect to this matter immediately and before the Agency formally releases the proposed draft rules for public comment.

The ANA serves more than 50,000 industry members that collectively invest more than $400 billion in marketing and advertising annually. Our members, many of them based in California, include companies of all sizes, including small and mid-sized firms, virtually all of which rely on data-driven advertising practices that give consumers access to relevant information, messaging, and advertisements at the right time and in the right place.

The ANA strongly supports consumer privacy and believes consumers deserve meaningful protections in the marketplace. The CPRA, as approved verbatim by California voters via ballot initiative, sets forth the foundational structure for privacy rights and obligations in the state. By dramatically altering those rights and obligations in a way that directly disregards the directives set forth in the law, the Agency's draft regulations transform the interpretation and application of the CPRA into something that Californians did not review or approve. The Agency's proposed draft regulations exceed the regulatory authority granted to it by statute.

The Agency's CPRA regulations should follow the letter and spirit of the CPRA and must not contravene or extend beyond the plain language of the statute. We therefore urge you to reconsider issuing these

proposed regulations, and to work to align proposals with the text of the CPRA. We highlight below two examples of many where the proposed regulations contradict the language of the CPRA.

- **The Draft Regulations' Restrictions on the Collection and Use of Personal Information Extend Well Beyond the Text of the CPRA.** According to the CPRA, "[a] business's collection, use, retention, and sharing of a consumer's personal information shall be reasonably necessary and proportionate to achieve the purposes for which the personal information was collected or processed, or for another disclosed purpose that is compatible with the context in which the personal information was collected, and not further processed in a manner that is incompatible with those purposes."[1]

  Despite the clear language and intent of this provision, the proposed draft rules set forth several "illustrative examples" of uses of personal information that, according to the Agency, would be prohibited under this CPRA requirement. Those illustrative examples create entirely new substantive bans and limitations on specific uses of personal information that would otherwise be permissible under the CPRA.

  For instance, Example (3) in Section 7002(b) would prohibit Business C from selling geolocation information acquired in its provision of services without the explicit consent of the affected consumer. This is not accurate.

  The CPRA already directly regulates the collection and use of geolocation information, including the sale or sharing of such data. However, such sales and sharing of geolocation information can still take place under the law, based on notices provided to consumers and the business's offering of a means to opt out of such transfers. Additionally, other illustrative examples like Example (2) in Section 7002(b), would ban uses of data in ways the CPRA does not. The proposed draft rules consequently exceed the Agency's authority by handing down complete bans and other limitations by regulatory fiat—bans and severe limitations that are nowhere present in the CPRA.

- **The CPRA Explicitly States Adherence to Global Privacy Settings Is Optional, While the Draft Regulations Make Such Adherence Mandatory.** According to the CPRA, businesses "may elect" ***either*** to (a) "[p]rovide a clear and conspicuous link on the business's internet homepage(s) titled 'Do Not Sell or Share My Personal Information'" ***or*** (b) allow consumers to "opt-out of the sale or sharing of their personal information… through an opt-out preference signal sent with the consumer's consent by a platform, technology, or mechanism, based on technical specifications to be set forth in regulations[.]"[2]

  The CPRA therefore gives businesses the choice either to allow consumers to opt out through a do-not-sell link on their homepage(s) ***or*** through user-enabled global privacy controls. In direct contrast to this optional structure set forth in the text of the law itself, the Agency proposes that adherence to user-enabled global privacy controls is mandatory. This is plainly inconsistent with the clear choice outlined in the statute ***either*** to process such global controls ***or*** offer an opt-out link.

  Additionally, the draft proposed regulations overlook important provisions of the CPRA regarding global privacy controls. The CPRA tasks the Agency to issue particularized regulations governing user-enabled global privacy controls that provide safeguards to ensure such controls are true expressions of consumer choice that are not set by intermediaries by default. For example, the CPRA states the Agency's global privacy control requirements "should… clearly represent a consumer's intent and be free of defaults constraining or presupposing such intent."[3] Additionally,

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[1] Cal. Civ. Code § 1798.100(c).
[2] *Id.* at § 1798.135(b)(3).
[3] *Id.* at § 1798.185(a)(19)(A)(iii).

the CPRA regulatory directive tasks the Agency with "ensur[ing] that the manufacturer of a platform or browser or device that sends the opt-out preference signal cannot unfairly disadvantage another business."[4]

These safeguards—which the Agency is specifically directed to consider and issue regulations to effectuate—are nowhere present in the proposed draft regulations. Without such safeguards surrounding global controls, consumers are at risk that choices will be made for them by parties that do not consult them prior to making a blanket choice that will impact how the consumer experiences the Internet.

Making adherence to global privacy controls mandatory is an extra-legal step that completely ignores the CPRA's regulatory directive to provide key safeguards. Instead, the proposed regulations would eliminate the option that is specifically designed for businesses in the law while foregoing the statutory requirement to issue rules that provide critical protections surrounding global controls.

The ANA and our members support the Agency's goals to provide consumers with improved privacy protections, but the proposed draft rules implementing CPRA contain many provisions that materially change the obligations of millions of businesses under the CPRA. We ask you to consider the concerns outlined in this letter when issuing updates to the proposed draft regulations, and we believe further discussion of these issues would be extremely useful to foster a better understanding of the significant and substantial issues inherent in the proposed draft rules.

We would welcome a meeting with you to further explain our concerns with the proposed draft regulations (some of which we outline above), so we can work toward solutions that all of California's citizens and employers can embrace. The CPRA implementing regulations must be consistent with the letter of the law itself. We look forward to working with you on alternative provisions and solutions that are aligned with the text of the CPRA.

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Thank you for your consideration of this letter.

Sincerely,

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[4] *Id.* at § 1798.185(a)(19)(A)(i).