



November 3, 2022

Jennifer M. Urban
 Chairperson, California Privacy Protection Agency Board
 2101 Arena Boulevard
 Sacramento, CA 95834

Sent via email: Jennifer.Urban@cpra.ca.gov

SUBJECT: BUSINESS COMMUNITY CONCERNS REGARDING CPRA REGULATORY PROCESS

Dear Chair Urban,

We write to you on behalf of the California Chamber of Commerce (CalChamber) and the organizations listed below, which represent a significant portion of California's business community. Our members are deeply concerned about the CPRA taking effect on January 1, 2023, prior to the Agency finalizing the necessary and long overdue regulatory guidance.

We believe that it is imperative for the Agency to effectuate the voters' intent to provide for a six-month delay between the adoption of final regulations and the date that companies must begin compliance and a 12-month delay in the adoption of final regulations and enforcement of the CPRA. At the same time, we urge that it is critical to get this done right, rather than to get it done rushed.

We recognize the magnitude of the task that the CPRA charged this new California Privacy Protection Agency ("Agency") with upon its formation: to issue final regulations implementing the CPRA by July 2022, less than 16 months after the first Board members were appointed. The complications that come with building a brand new agency and the challenges of undertaking a formal regulatory process, let alone doing both of those tasks at the same time, are considerable. Nonetheless, that is the timeline approved by the voters and relied upon by our members, who simply want to know how to comply with the law. We ask that you, in turn, consider the significant burden placed on businesses, particularly if they must unwind all of their compliance work if their best and good faith interpretation of the statute does not ultimately align with the final regulations.

Our associations have consistently stood in favor of privacy laws and regulations that can be operationalized without unintended consequences and unnecessary exposure to litigation. To that end, the business community has worked to provide as much feedback as possible using the avenues made available to us since this Agency's inception. However, we have found some of those avenues lacking, particularly with respect to the lack of representation from members of the business community at the Agency's informational sessions. Along these same lines, we were also discouraged to find that the stakeholder sessions (which we participated in) did not receive the same level of Board member attendance and active participation as the informational sessions. While we have done our best to provide as much constructive feedback as possible to the draft regulations, our members' concerns about the overdue regulations are valid and should be given greater consideration as the Agency moves forward with the regulatory process.

To be clear, the fact that we do not have final regulations in time to effectively implement raises significant concerns both practically, and legally. When the voters approved Proposition 24, they approved a system that included a full year of ramp up time between the July 1, 2022 deadline for final regulations and the commencement of enforcement actions beginning July 1, 2023. At best, even if a portion of the mandated regulations were completed and submitted to the Secretary of State by November 30 (which we understand is unlikely), businesses would get half that amount of time. By that same token, businesses would have received six months between the regulations being finalized on July 1, 2022, and the law becoming effective on January 1, 2023 had the Agency adhered to the voter approved deadlines.

Instead, California businesses are being placed in the untenable position of being required to comply with and effectuate the CPRA starting January 1st, without having been provided all of the final regulations necessary to do so. This is hugely problematic, not only as an operational matter, but also as a legal one.

Recent Case Illustrates that Past-Due Regulations are Problematic and Warrant Remedies

The impacts of a failure to timely complete regulations is well-illustrated in a recent lawsuit involving similar circumstances. In 2022, the California Hispanic Chambers of Commerce, Kruse & Son Inc, California Grocers Association, California Restaurants Association, and the California Retailers Association ("Petitioners") successfully petitioned for a prohibitory writ of mandate against the California Department of Food and Agriculture (CDFA) and the Attorney General's Office ("Respondents"). This CDFA suit involved another voter approved law, the Prevention of Cruelty to Farm Animals Act enacted pursuant to Proposition 12 in 2018 regulating the raising and selling of meat products. Proposition 12 provided that CDFA and the California Department of Public Health "shall jointly promulgate rules and regulations for the implementation of this act by September 1, 2019" which was three months before the act's first requirements took effect. Notwithstanding that September 1, 2019, deadline, those departments did not release a Notice of Proposed Act (NOPA) pursuant to the Administrative Procedures Act (APA) until May 2021 and did not issue its revised proposed regulations until December 2021. At the time that the court granted a prohibitory writ of mandate (January 21, 2022), final regulations were not in effect, but the law was to go into effect on January 1, 2022.

In this CDFA lawsuit, the Petitioners sought a judicial declaration that the square-footage requirement affecting pork sales effective January 1, 2022, are unenforceable absent final implementing regulations and further sought to delay enforcement of that same requirement until after the regulations are promulgated, consistent with voter intent. The court ultimately agreed with the Petitioners and issued a declaration that the petitioning organizations and their members owners and operators “are not subject to enforcement of the prohibition on sales of whole pork meat ... [citations omitted] ... until 180 days after final regulations are enacted... ” subject to potential adjustments once the final regulations were in effect.

In its decision, the court noted that the Act’s deadline on the promulgation of regulations is mandatory, not permissive, and infers a mandate for pre-enforcement regulations. Further supporting this was that the regulations that the voters intended are regulations “for the implementation of [that] act ...” In other words, Proposition 12 was not self-executing. Accordingly, the court rejected the Respondents’ argument that the Act is clear enough to enforce without additional guidance (as the act’s square footage requirements and many of the Act’s definitions are explicit).

The court also distinguished the CDFA case from two prior cases, *Alfaro v. Terhune* (2002) and *Fisher v. State Personnel Board* (2018). In the first case, the court said that the specification to regulate “as necessary” indicated a discretionary grant limiting regulatory authority, rather than commanding it – which is materially different from Proposition 12’s mandate. In the second case involving incompatible employment, the statutory provisions in question directed the Department of Human Resources to “adopt rules governing the application” of the bar on incompatible employment, but also provided that “existing procedures shall remain in full force and effect” until the department “adopts rules governing the application” of that section. In other words, the court in that case determined that the statute was binding even before CalHR’s implementation of rules governing the statute’s application. In the CDFA suit, Proposition 12 built upon a prior voter approved law, the Prevention of Farm Animal Cruelty Act (Proposition 2 from 2008) but contained no reference to preexisting or alternative rules of implementation; rather, the text described mandatory regulations in effect prior to square footage requirements governing sales.

This situation is nearly identical to that of the CDFA suit. Similar to Proposition 12, Proposition 24 mandates regulations effectuating the CPRA (Civ. Code Section 1798.185 specifically states “shall solicit broad public participation and adopt regulations to further the purposes of this title”). While Proposition 24 also authorizes additional regulations “as necessary” to further the purposes of the CPRA, there are a host of specified areas in which new regulations are explicitly required, such as with respect to the Act’s new audit requirements. While the regulations issued by the Attorney General under the CCPA remain in place absent changes by the Agency’s upcoming regulations, unlike the CalHR case which determined “existing procedures remain in full force and effect, Proposition 24 does not have existing procedures for mandated regulatory topics such as audits, automated decision-making technology-specific opt-out rights, and the like. Here, the Agency’s regulations were due by July 1, 2022, six months prior to Proposition 24’s effective date, whereas the Agency only commenced formal rulemaking on July 8th, when it issued its NOPA in accordance with the APA. Finally, like Proposition 12, the CPPA has not issued a NOPA for some of the categories required in Proposition 24.

Without intervention, Proposition 24 will go into effect without any completed regulations and with some required regulations not even begun.

In Absence of a Delay in the CPRA’s Effective Date, we Request that the Agency, at a Minimum, Delay the July 1, 2023, CPRA Enforcement Date

It is critical that the Agency’s failure to issue regulations be addressed out of fairness to those striving to comply with the CPRA and to mitigate the harm to covered businesses, employees, and consumers. The fairest solution would be to delay CPRA’s effective date until six months after final regulations are completed as originally intended in Proposition 24. However, understanding that the Agency may not possess the authority to do so, at the very least the Agency must delay the July 1, 2023, enforcement date.

CalChamber and others have consistently raised concerns about covered businesses having to comply with the law and potentially having to legally defend themselves for failing to meet the requirements of *future* regulations. At a legislative budget subcommittee hearing earlier this spring, Agency staff dismissed concerns that the regulations would not be timely adopted, stating that “the California DOJ also did not

meet their deadline but faced no issue, no legal implications, for missing that deadline necessarily". We respectfully disagree.

The consequences to businesses are very real and highly detrimental and should not be minimized. Consider, for example, the new audits that covered businesses will face under the CPRA. Covered businesses are subject to audits starting January 1. Even if an enforcement action cannot be commenced for violations until after July 1, 2023, we must still comply with those audit requirements on January 1, without any idea of how to do so, for lack of final regulations.

Further, the problem created by the past-due CPRA regulations is only exacerbated by the fact that the employee and business to business sunsets (Cal. Civ. Code Sec. 1798.145 (m) and (n)) are set to lapse on January 1, 2023, making the consumer law now applicable in employment contexts. In fact, **none of the regulations drafted thus far take employees or business-to-business transactions into account.** They relate to consumers, not employees or employment communications.

To say that this is overwhelming and highly problematic as a matter of operationalizing the voters' intent is a massive understatement. We fail to see how a law that cannot be implemented by its effective date, let alone implemented properly, protects consumers or takes into consideration impact on businesses. Stated plainly, the problem identified has nothing to do with the intentions and good faith efforts of businesses to comply; it has to do with the delayed regulations of this Agency. Yet, the ones who will feel the consequences of that failure are businesses, their employees and the consumers they serve.

We ask that you seriously consider whether this process serves Californians and their privacy rights, and the businesses struggling to understand what it is they must do to be compliant. As stated at the top of this letter, our organizations represent businesses big and small. We ask that you keep in mind that not all businesses have the resources to pay for compliance attorneys, let alone make operational changes only to find that they did it incorrectly because they did not have the required regulations to do so properly. Without timely regulations, we do not believe that this process has been and will be in furtherance of privacy. We must therefore ask for a six-month delay in implementation and/or 12-month delay of enforcement of the CPRA, after the final regulations are adopted.

Sincerely,



Ronak Daylami
Policy Advocate
California Chamber of Commerce
on behalf of

Acclamation Insurance Management Services
Advanced Medical Technology Association
Aerospace and Defense Alliance of California
Alliance for Automotive Innovation
Allied Managed Care
American Association of Advertising Agencies
American Council of Life Insurers
American Property Casualty Insurance
Association
Association of California Life and Health
Insurance companies
Association of National Advertisers
Auto Care Association
Biocom California
Brea Chamber of Commerce
BSA The Software Alliance
Building Owners and Managers Association,
California

California Association of Collectors
California Association of Health Facilities
California Association of Winegrape Growers
California Attractions and Parks Association
California Bankers Association
California Beer and Beverage Distributors
California Business Properties Association
California Chamber of Commerce
California Credit Union League
California Farm Bureau
California Grocers Association
California Hospital Association
California Hotel & Lodging Association
California Land Title Association
California Manufacturers & Technology
Association
California New Car Dealers Association
California Restaurant Association

California Retailers Association
California Self Storage Association
California State Council of the Society for Human
Resource Management (CalSHRM)
California Travel Association
California Water Association
Carlsbad Chamber of Commerce
CAWA, Representing the Automotive Parts
Industry
Chino Valley Chamber of Commerce
Civil Justice Association of California
Coalition of Small and Disabled Veteran
Businesses
Consumer Data Industry Association
Costa Mesa Chamber of Commerce
Escrow Institute of California
Family Business Association of California
Fidelity Investments
Flasher Barricade Association
Fresno Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chamber of Commerce
Greater San Fernando Valley Chamber of
Commerce
Housing Contractors of California
Insights Association

Laguna Niguel Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Angeles Area Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
NAIOP, California
National Association of Mutual Insurance
Companies
Palos Verdes Peninsula Chamber of Commerce
Personal Insurance Federation of California
Rancho Cordova Area Chamber of Commerce
San Gabriel Valley Economic Partnership
San Marcos Chamber of Commerce
Santa Barbara South Coast Chamber of
Commerce
Santa Clarita Valley Chamber of Commerce
Santa Maria Valley Chamber of Commerce
SIIA
Southwest California Legislative Council
TechNet
Torrance Area Chamber of Commerce
Tri County Chamber Alliance
United Parcel Service
Valley Industry & Commerce Association
West Ventura County Business Alliance
Western Electrical Contractors Association
Western Growers Association
Wine Institute

cc: Board Member Lydia de la Torre, California Privacy Protection Agency
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Board Member Christopher Thompson, California Privacy Protection Agency
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Darci Sears, Office of Assembly Speaker Anthony Rendon
Eric Dang, Office of the Senate President Pro Tempore Toni Atkins
Landon Klein, Assembly Privacy & Consumer Protection Committee
Christian Kurpiewski, Senate Judiciary Committee
Anthony Lew, Office of the California Attorney General

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