

June 20 2020 testimony of Mary Stone Ross to the California Legislature about CPRA

Chairman Chau and Members of the Committee, thank you for inviting me to testify today. My name is Mary Stone Ross. I was formerly president of Californians for Consumer privacy, one of the coauthors of the initiative that became the California Consumer Privacy Act (CCPA), and, although I don't speak on their behalf today, I am also a member of the Executive Committee for the Antitrust and Privacy Section of the California Lawyer's Association. I am here today in my personal capacity as a privacy advocate.

In passing the CCPA, the California Legislature accomplished something truly remarkable. You created the first robust privacy law in the nation.

Our Attorney General and his dedicated staff have spent the last year carefully drafting clear and concise rules to enforce that remarkable law. CCPA enforcement goes into effect July 1st of this year. The privacy of the people of California – and the world - is safer as a result of your hard work.

Thank you.

Please do not negate all of your hard work by supporting a watered down, hobbled sequel to the CCPA. As currently written, the CPRA sabotages the consumer privacy rights established by the CCPA by weakening definitions, undermining enforcement, and creating new rights that sound good in campaign slogans but will have little practical consequence.

The news reporting on the CPRA has been frustrating for me to read. In her article titled, "Inside the Closed-Door Campaigns to rewrite California's Privacy Law, Again" published on February 6, 2020 Issie Lapowsky documents how Google, Facebook, Experian, Twitter and other corporations whose bad behavior this law is supposed to check, lobbied Mr. MacTaggart for exemptions.¹ It worked. Industry's heavy-handed influence is apparent throughout the second and final version of the initiative, from eliminating the word "enforcement" from the title, to inserting more "reasonable-ies," to capping the new enforcement Agency's budget. In contrast, only seven of the privacy coalition's 45 suggested changes were incorporated.

Regardless of how the CPRA came to be, I'm here to try to help you assess the impact of the actual text. First, I wish to focus on the two new rights that Californians for Consumer Privacy claims that the new initiative will create: the new category and rights attached to "sensitive personal information" and the creation of the enforcement agency.²

¹ <https://www.protocol.com/inside-california-privacy-law-redo>

² <https://www.caprivacy.org/your-privacy-rights/>

From a privacy standpoint, the line between sensitive and non-sensitive information is often illusory.³ With that said, the first draft of the CPRA granted substantial rights to a consumer over their sensitive personal information.⁴ Unfortunately, these rights—which would in fact have strengthened the CCPA—were all deleted in the final version that will be on the November ballot if it qualifies.

Enforcement is the key to any successful privacy law.⁵ I have publicly stated on numerous occasions that relatively weak enforcement—significantly by eliminating the private right of action and the rights of District Attorneys and City Attorneys to enforce the CCPA—was a huge mistake made in the first legislative compromise. An attorney anonymously told me that they really want to advise their clients to allocate resources to comply with the CCPA but can't in good faith if the likelihood of enforcement is negligible. Clients pay for legal risk assessment and have limited compliance budgets. Fund Enforcement. Give the CCPA a chance to work. Then tweak it.

I agree with the authors that California needs a Data Protection Agency. Unfortunately, this one is a woefully underfunded paper tiger. The final version only requires the General Fund of the state to grant the agency \$5M its first year and \$10M thereafter, effectively capping the Agency's budget at \$10 M per year.⁶ As a point of comparison, the FTC's budget is well over \$300 M and yet is still insufficient.⁷

Moving on, the CPRA further delays privacy protections for California workers and I wonder whether labor unions will in fact support the CPRA. The CPRA extends the exemptions for

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<https://www.theguardian.com/technology/2018/mar/17/facebook-cambridge-analytica-kogan-data-algorithm> it is difficult to decide what is sensitive and what isn't. Remember, Cambridge Analytica used Facebook "likes"—a category that isn't considered sensitive—to draw inferences about a person's race, gender, sexual orientation and other truly sensitive pieces of information

⁴ The first draft included new requirements for businesses to get affirmative consent—an opt-in—before they could sell sensitive personal information; and, the right to opt-out of the use or disclosure of their sensitive personal information for advertising and marketing. Further, in the first draft of the initiative consumers had a right to know if a business was profiling them and using their personal information for financial, housing, insurance, employment, health care, education as well as the underlying algorithms.

⁵ Enforcement is further weakened in the CPRA. The CCPA preserved the private right of action for data breaches, but this right is curtailed in the CPRA. The final version of the initiative makes a seemingly small change—an or to an and—that will raise the burden on when a consumer can bring a claim against a business for failing to protect their personal information.

⁶ The first version of the initiative which did not set a limit on the new Agency's budget and said the Consumer Privacy Fund would first go to offset costs incurred by the Attorney General, the Courts and "to provide for a sufficient budget for the California Privacy Protection Agency to carry out its duties under this title, and then for the purposes of establishing an investment fund in the State Treasury. In contrast, the second version after offsetting the AG and court's costs, puts all of the remainder in a newly established "investment fund in the State Treasury."

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“employee and business to business communications until January 1, 2023” that was supposed to sunset on January 1, 2021. There are numerous examples of employers surveilling workers outside the normal scope of their employment including through pregnancy tracking⁸ and location monitoring apps⁹. This is more acute today as huge amounts of Californian workers are working from home due to COVID-19. Unfortunately—if the CPRA passes—all of this information will be exempt from the CCPA for two more years.¹⁰

The new initiative also undermines the Office of the Attorney General. When we originally drafted the CCPA, we did not want to write a law that was stuck in time. For this reason, we granted the OAG rulemaking and enforcement authority. The office truly rose to the occasion and the resulting rules undoubtedly strengthen the CCPA. CPRA takes away the AG’s rulemaking authorities. Further it undermines the existing rules. Notably, it gives businesses a choice whether to respond to an electronic signal **OR** to post a “do not sell my personal information” link. Currently, the CCPA as clarified by the rules require a business to do both.¹¹

The new initiative creates huge loopholes by weakening some of the core definitions including “Service Providers,” “publicly available,” “deidentified” and “verifiable consumer request.”¹² It

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<https://www.washingtonpost.com/technology/2019/04/10/tracking-your-pregnancy-an-app-may-be-more-public-than-you-think/?arc404=true>

⁹ <https://www.bloomberg.com/opinion/articles/2018-01-18/personality-tests-are-failing-american-workers>;
<https://www.theguardian.com/science/2016/sep/01/how-algorithms-rule-our-working-lives>
<http://fortune.com/2016/02/17/castlight-pregnancy-data/>
<https://www.theatlantic.com/technology/archive/2017/01/employer-gps-tracking/512294>
https://www.washingtonpost.com/news/the-switch/wp/2015/05/14/some-companies-are-tracking-workers-with-smartphone-apps-what-could-possibly-go-wrong/?utm_term=.8d2b71c89ae5

¹⁰ According to the legislative analysis, “Ultimately, the one-year sunset provides the Legislature time to more broadly consider what privacy protections should apply in these particular employment-based contexts, and whether to repeal, revise, and/or make these exemptions permanent in whole or in part moving forward.” Including the employee exemption in the initiative undermines the deliberate period of debate for all interested parties—including privacy groups, labor unions, and businesses—to clarify their positions and come up with a more nuanced understanding of under what contexts an employee’s personal information should be exempt from the CCPA.

¹¹ <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/oal-sub-final-text-of-reggs.pdf>

§ 999.315. Requests to Opt-Out (d) *If a business collects personal information from consumers online, the business shall treat user-enabled global privacy controls, such as a browser plugin or privacy setting, device setting, or other mechanism, that communicate or signal the consumer’s choice to opt-out of the sale of their personal information as a valid request submitted pursuant to Civil Code section 1798.120 for that browser or device, or, if known, for the consumer.*

¹² **The CPRA will make it even harder for businesses to comply with the CCPA, raises compliance costs, and adds an unnecessary level of uncertainty into the compliance process.** This is bad for businesses and consumers. Businesses must already be in compliance with the CCPA and are now addressing further changes required by the AG regulations without knowing whether the CPRA will pass if it gets onto the November 2020 ballot. Changes in

also expands exemptions—including for sharing personal information with law enforcement and research for commercial purpose—which will hurt consumers.

In conclusion, I wish to remind you of the history of the CCPA. Respectfully, we needed an initiative to get you to pass it. But it worked, and California now has the most comprehensive privacy law in the United States, a model that other states and perhaps even the federal government will follow. We no longer need a privacy initiative to get Sacramento's attention. As you know well, privacy legislation is complicated. It should be negotiated through the legislature so that all stakeholders have a chance to be heard, and voted into law by elected officials who answer to the people who voted them into—and out of—office.

Thank you and I look forward to answering your questions.

definitions—even business friendly ones—will increase these costs and reduce the likelihood of compliance.