



August 13, 2021

Attorney General Rob Bonta
California Department of Justice
1300 I Street, Suite 1740
Sacramento, CA 95814

Lisa B. Kim
Privacy Regulations Coordinator
California Office of the Attorney General
300 South Spring Street, First Floor
Los Angeles, CA 90013
PrivacyRegulations@doj.ca.gov

Re: *Request for Clarification of OAG's Recently Published FAQ on User-Enabled Privacy Controls under the California Consumer Privacy Act*

Dear Attorney General Bonta:

The Civil Justice Association of California (CJAC) seeks clarification from your office about its recently published statements on user-enabled global privacy controls (GPCs) under the California Consumer Privacy Act of 2018 (CCPA), and in context with its companion measure, the California Privacy Rights Act of 2020 (CPRA).¹ The statements appear on the OAG website as updated responses to Frequently Asked Questions (FAQs) from your office for consumers about their CCPA rights.

Clarity is critically important when it comes to laws since all should know and understand what they require and what the consequences are for failing to comply. Conflict between what a law states and what an enforcement agency reads and interprets it to mean can breed confusion, misunderstanding and needless litigation. Unfortunately, that is the predicament provoked by the updated FAQs. Here is where and why CJAC believes clarification is warranted:

- **The OAG's statements about GPCs are at odds with the CCPA's silence on the matter and conflict with the plain language of the companion CPRA.**

The recently-added statements in the FAQ on the OAG's website indicate the GPC is mandatory:

Developed in response to the CCPA and to enhance consumer privacy rights, the GPC is a 'stop selling my data switch' that is available on some internet browsers, like Mozilla Firefox, Duck Duck Go, and Brave, or as a browser extension. It is a *proposed* technical standard that reflects what the CCPA regulations *contemplated* – some consumers want a comprehensive option that broadly signals their opt-out request, as opposed to making requests on multiple websites on different browsers or devices. Opting out of the sale of personal information should be easy for consumers, and the GPC is one option for consumers who want to

¹ As you know, the CCPA is a legislatively enacted statute for which regulations have been adopted, and the CPRA is a statutory initiative that became effective December 16, 2020, but with many of its operational provisions, including opt-outs for selling a consumer's private information, delayed until January 1, 2023.

submit requests to opt-out of the sale of personal information via a user-enabled global privacy control. *Under law, it must be honored by covered businesses as a valid consumer request to stop the sale of personal information.*²

The CCPA states, however, that in order to comply with its “Do Not Sell My Personal Information” provision, a business must place “a clear and conspicuous link on [its] Internet Web page that enables ... the consumer to opt out of the sale of the consumer’s personal information.”³ The statute says nothing about GPCs or global opt-out requests. The CCPA’s silence on GPCs is not an appropriate basis for creating a mandate to honor them as opt-outs, which is an enlargement of the statute.⁴

Moreover, the plain language of CPRA removes all doubt about the impropriety of a GPC mandate. Under CPRA, businesses can still (a) provide clear and conspicuous opt-out links on their website or (b) allow consumers to opt out through a “preference signal sent with the consumer’s consent by a platform, technology, or mechanism, based on technical specifications to be set forth in regulations[.]”⁵

The CPRA goes out of its way to emphasize the ability of businesses to choose between the two methods, stating:

A business that complies with subdivision (a) is **not required** to comply with subdivision (b). For the purposes of clarity, a business **may elect** whether to comply with subdivision (a) **or** subdivision (b).⁶

Use of the conjunction “or” in the CPRA between these two options means that businesses may choose to comply by adopting one method or the other, not that one method of two alternatives listed is to swallow up and supplant the other. *Black’s Law Dictionary*, fourth edition, defines the word “or, conj.” as “[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.” *Webster’s Third New International Dictionary*, unabridged, defines “or” as “(2) Choice between alternative things, states, or courses.”⁷

Yet according to the OAG’s updated FAQs on its official website, this explicit “choice” statutorily accorded businesses is now replaced by a single remedy to be exercised solely at the discretion of the consumer. Apparently, all a consumer needs to do is decide that a website’s “Do Not Sell My Personal Information” button is insufficiently “clear and easy to find,” and then ignore it and use a GPC signal instead.

Why, if this GPC requirement is “a *proposed* technical standard,” as the FAQ says, is it being mandated now for business compliance? In fact, the FAQ appears to echo CCPA regulation by OAG mandating GPC signals be treated as opt outs, which was adopted a few months before CPRA’s passage.⁸ At the time the regulation was proposed, many including CJAC opposed it as inconsistent with CCPA and unworkable.⁹ Why require

² State of California Department of Justice, Rob Bonta Attorney General, *California Consumer Privacy Act (CCPA) FAQs*, Section B, #7, available at <https://oag.ca.gov/privacy/ccpa> (emphasis added).

³ CCPA, Civ. Code § 1798.135(a)(1).

⁴ A court reviewing an administrative regulation will independently determine whether the regulation is consistent and not in conflict with the enabling statute. “Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.” (*Morris v. Williams* (1967) 67 Cal.2d 733, 748.)

⁵ CPRA, Civ. Code § 1798.135(a), (b)(1), (3).

⁶ *Id.* at (b)(3) (emphasis added).

⁷ *Housing Authority of Kings County v. Peden* (1963) 212 Cal.App.2d 276, 279.

⁸ 11 CCR § 999.315(c).

⁹ See, 45 Day Written Comments at 721 (Dec. 6, 2019), <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/oal-sub-45day-comments.pdf>; Second Set 15 Day Written Comments at 171-72 (Mar. 27, 2020),

businesses to comply with the GPC regulatory mandate now, when it is not authorized by CCPA, and in 18 months will be obsolete given the express provision of CPRA making acceptance of GPC signals as opt outs optional?

- **Next, your office’s FAQ makes no mention of the CPRA’s explicit direction that the newly created California Privacy Protection Agency (CPPA) evaluate the reliability of GPCs for providing consumer choice and their impacts on businesses.**

For example, the FAQ does not acknowledge that the CPPA is required to “ensure that the manufacturer of a platform or browser or device that sends the opt-out preference signal cannot unfairly disadvantage another business.”¹⁰

Neither does the FAQ mention that the CPPA is charged with ensuring that user-enabled GPCs “clearly represent a consumer’s intent and [are] free of defaults constraining or presupposing such intent,” and do “not conflict with other commonly used privacy settings or tools that consumers may employ.”¹¹ Without completion of this essential evaluation in partnership with experts versed in GPC technologies, it is unknown whether GPCs are a reliable, workable, or secure means for conveying consumer choice to businesses.

While Board members have been appointed, some staff hired, and a first meeting held, the CPPA is reportedly still in the preliminary stages for determining “the initial steps that must be taken to meet a July 2022 deadline for setting policies [and] best practices...”¹² Voter approval of the CPRA ballot initiative and its newly created CPPA indicates an intent that regulation of user-enabled GPCs comes from the CPPA, perhaps in consultation with the OAG, but certainly not by the OAG alone. Your FAQs appear to contravene this intent, injecting confusion, worse confounded about what is required of businesses to comply.

We ask that the OAG revise the FAQs to make clear that honoring GPC signals is only one option available to business, and that GPC reliability and efficacy as a consumer opt-out consent mechanism must be assessed by the CPPA.

We are happy to answer any questions your office may have and look forward to the opportunity to work with you on clarifications.

Thank you for your consideration,

Respectfully,



Kyla Christoffersen Powell
President and Chief Executive Officer

cc: California Privacy Protection Agency
info@cpha.ca.gov

<https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/oal-sub-15day-comments-set2.pdf>.

¹⁰ CPRA, Civ. Code § 1798.185(a)(19)(A).

¹¹ *Id.*

¹² Holland & Knight Cybersecurity and Privacy Blog, *CPPA Inaugural Meeting Provides In-Depth Debate on Agency’s Agenda*, June 16, 2021;

<https://www.hklaw.com/en/insights/publications/2021/06/cpha-inaugural-meeting-provides-in-depth-debate-on-agencys-agenda>.