

EXHIBIT 12

CALIFORNIA PRIVACY PROTECTION AGENCY

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Date: May 3, 2024

To: California Privacy Protection Agency Board
(Meeting of May 10, 2024)

From: Maureen Mahoney
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California Privacy Protection Agency

Subject: Agenda Item 3—Legislative Update and Authorization of CPPA
Position on Pending Legislation. AB 1949 (Wicks): California
Consumer Privacy Act of 2020: collection of personal information
of a consumer less than 18 years of age

This memorandum provides

information, market research, the results of product testing, and reasonable inferences, among others;

- To emphasize that these provisions do not relieve businesses of their data minimization responsibilities;
- To remove the duplicative requirement that the Agency issue regulations to establish technical specifications for an opt-out preference signal that allows the consumer, or the consumer's parent or guardian, to indicate that the consumer is a child;
- To remove the requirement for the Agency to complete an age verification rulemaking by July 1, 2025; or, at the very least, to extend the deadline to July 1, 2026 or later.

Background

The California Consumer Privacy Act (CCPA) includes notice requirements for businesses, grants new privacy rights to consumers, including the rights to access, delete, correct, and stop the sale and sharing of their personal information, and imposes corresponding obligations on businesses.² The CCPA provides additional protections for children under 16. Businesses are not permitted to sell or share the personal information of consumers if the business has actual knowledge that the consumer is under 16, including if the business has willfully disregarded the consumer's age, unless the consumer, or the consumer's parent or guardian in the case of consumers who are under 13, has affirmatively authorized the sale or sharing of the consumer's information. Businesses are also liable for higher fines and penalties for violations of the CCPA involving the personal information of a consumer whom the business has actual knowledge is under 16.

The CCPA's actual knowledge standard reflects the federal Children Online Privacy Protection Act (COPPA), adopted in 1998.³ COPPA requires operators of a website or online service that is directed to children, defined as under 13, or any operator that has actual knowledge it is collecting personal information from a child, to obtain verifiable parental consent before collecting, using, or disclosing the personal information of child. Children's advocates have criticized the actual knowledge standard in COPPA and COPPA's application only to children under 13.⁴ Privacy advocates have countered those criticisms on the grounds that stricter age verification and teen protections could incentivize greater data collection.⁵ (CCPA goes beyond COPPA, however, in providing opt-in protections for teens under 16).

²

In 2022, California sought to further increase protections for children online by

California Attorney General Rob Bonta filed a notice of appeal to overturn the preliminary injunction,¹³ and in December, AG Bonta filed an opening brief with the Ninth Circuit Court of Appeals.¹⁴

AB 1949 seeks to provide augmented online protections for children under 18 and would require businesses to meet a higher standard of identity verification than under the existing CCPA. According to the sponsor of AB 1949, AG Bonta, the CCPA's actual knowledge standard:

[A]llows businesses to skirt the CCPA's specific prohibition on selling young users' data or using it for certain behavioral advertising by arguing that they did not have actual knowledge that the user was under the threshold age, which is currently age 16. This gives businesses an incentive to ignore signs that children are using their sites, and puts businesses that try to identify and protect young users at a competitive disadvantage.¹⁵

For example, AG Bonta recently co-led a coalition of 33 attorneys general in an action against Meta alleging that Meta violated COPPA, among other laws, in its treatment of children. The complaint alleged that Meta sought to "maintain willful ignorance of its users under the age of 13" but that Meta "routinely obtains actual knowledge of under-13 users on Instagram."¹⁶ Indeed, that "Meta's actual knowledge that millions of Instagram users are under the age of 13 is an open secret that is routinely documented, rigorously analyzed and confirmed, and zealously protected from disclosure to the public."¹⁷ This includes "an internal report presented to Zuckerberg regarding the four million under-13 users on Instagram[.]"¹⁸

According to the complaint, "Despite Meta's actual knowledge and documentation of under-13 Instagram users and data collection from under-13 users in the 2018 report, Meta did not obtain verifiable parental consent for its ongoing collection of personal information from those users."¹⁹ Instead, according to the complaint, "After Meta receives a report that an Instagram user is under 13 years old, Meta's policy is

¹³ Notice of Preliminary Injunction Appeal, NetChoice, LLC. v. Bonta, Bonta, No. 5:2022cv08861 (N.D. Cal. Filed Oct. 18, 2023), https://netchoice.org/wp-content/uploads/2023/10/Bonta-Appeal_PI_NetChoicevBonta.pdf.

¹⁴ Appellant's Opening Brief, NetChoice, LLC. v. Bonta, Bonta, No. 23-2969 (9th Cir. 2023), <https://oag.ca.gov/system/files/attachments/press-docs/NetChoice%20Ninth%20Cir.%20Opening%20Brief.pdf>.

¹⁵ Quoted in Assembly Committee on Privacy and Consumer Protection Analysis, AB 1949 (Wicks – As Introduced January 29, 2024 at 1 (March 30, 2024).

¹⁶ Complaint, Arizona et. al. v. Meta Platforms. Inc. et. al., No. 4:23-cv-05448-YGR (N.D. Cal. Filed Nov. 22, 2023), at ¶ 644, <https://oag.ca.gov/system/files/attachments/press-docs/Less-redacted%20complaint%20-%20released.pdf/>.

¹⁷ Id. at 645.

¹⁸ Id. at 646.

¹⁹ Id. at 660.

to allow the user to continue using their Instagram account and disregard the report if the account does not contain a user bio or photos.”²⁰

However, rather than amending a separate part of the Civil Code, like the CAADCA, this bill seeks to amend the privacy statute, raising questions with respect to the bill’s impact on the privacy of all Californians. Staff notes that there is currently no privacy-protective way to determine whether a consumer is a child. Thus, by seeking to remove the actual knowledge provision from the CCPA, and not replacing it with a set of criteria for determining whether the consumer is a child, this bill could reduce privacy by incentivizing businesses to collect even more personal information from all users to verify children’s ages.

The Assembly Privacy & Consumer Protection Committee advanced AB 1949 on April 2. The bill is now under consideration by the Assembly Appropriations

- Prohibit a business from collecting, using (unless the use is short-term or transient), disclosing, selling or sharing the personal information of a

Analysis

Given the tension between updating the actual knowledge standard and protecting users' privacy, staff recommends a balanced approach: to either maintain the actual knowledge standard or establish in statute an alternative standard, such as that the business "knew or should have known that the consumer is less than 18 years of

similarly a proof generating service is unaware of the requesting party. As a result, a

a diverse dataset of faces, the use of facial recognition can pose a risk of gender or racial discrimination.³⁷

The FTC's recent decision to deny Yoti's petition "without prejudice to the applicants filing in the future" for approval of their technology as a verifiable parental consent method under COPPA also suggests that these methods are not yet ready for widespread use. Yoti and other groups had sought approval for a "Privacy-Protective Facial Age Estimation" technology, in which the user's facial geometry is analyzed to determine age. During the public comment period of the application process, concerns were raised about privacy protections, accuracy of the technology, and potential use of deepfakes to fool the system. In denying the petition, the FTC noted that in the future, they will likely have additional information to better understand age verification technologies and the result of the National Institute of Standards and Technology's (NIST) evaluation of Yoti's technology.³⁸

Recent legislation in other jurisdictions

While COPPA and most state privacy laws have an actual knowledge standard for determining whether the consumer is a child, momentum has been building in Congress to update COPPA with a new standard. For example, Senators Markey and Cassidy have recently updated the Children and Teen's Online Privacy Protection Act, known as "COPPA 2.0" co-sponsored by Senate Commerce Committee Chair Maria Cantwell and Ranking Member Ted Cruz.³⁹ COPPA 2.0 expands COPPA's consent requirement for the collection, use, and disclosure of personal information of children under 13 years of age. COPPA 2.0 also expands the definition of "operator" to include any person who controls the collection, use, and disclosure of personal information of children under 13 years of age. COPPA 2.0 also expands the definition of "operator" to include any person who controls the collection, use, and disclosure of personal information of children under 13 years of age. COPPA 2.0 also expands the definition of "operator" to include any person who controls the collection, use, and disclosure of personal information of children under 13 years of age.

Nearly every state comprehensive consumer privacy law requires consent for certain processing of the personal information of a known child under 13, similar to COPPA. Some states have sought to provide additional protections. For example, an amendment to the Connecticut law, which will go into full effect on October 1, 2024, will raise the age of a “minor” to under 18 years of age, among other protections.⁴² With respect to minors, Connecticut retains the actual knowledge standard.⁴³ Florida has similar protections with respect to online platforms “likely to be predominantly accessed by children[.]”⁴⁴ Colorado is currently considering a similar bill that would raise the age of a “minor” to under 18 years of age⁴⁵ and apply the actual knowledge standard to controllers.⁴⁶ Once New Jersey’s law goes into effect in January 2025, teens will receive additional protections (requiring consent for certain processing, such as for targeted advertising, sale of data, or profiling) when a business has actual knowledge a consumer is between the ages of 13 to 16.⁴⁷

Regulations

Staff recommends that the Board indicate that the Agency’s support of the bill also hinges on the removal or amendment of the bill’s new rulemaking requirements. The bill currently requires the CPPA to complete a rulemaking with respect to age verification by July 1, 2025—approximately six months after the bill goes into effect. This is unnecessary because the Agency already has broad rulemaking authority under Civ. Code § 1798.185(b). Additionally, under the Administrative Procedure Act process, it is likely impossible to complete a rulemaking in six months. Staff’s

