

Consent and Advertising in 2023



PRESENTATION TO WIREWHEEL – SPOKES 2022

Consent and Advertising

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Other States Besides California



Definitions

	GDPR	CCPA	CPRA	VIRGINIA	COLORADO	UTAH	CONNECTICUT
Personal information or personal data	✓	✓	✓	✓	✓	✓	✓
Sensitive personal information	✓		✓ (opt-out)	✓ (opt-in)	✓ (opt-in)	✓ (opt-out)	✓ (opt-in)
Cross-context behavioral advertising			✓				
Targeted advertising				✓	✓	✓	✓

Opt-out Obligations

Law	Rights
GDPR	<ul style="list-style-type: none">• Right to restrict processing
CCPA	<ul style="list-style-type: none">• Right to opt-out of the sale of personal information
CPRA	<ul style="list-style-type: none">• Right to opt-out of the sale of personal information• Right to opt-out of sharing personal information• Right to limit use and disclosure of sensitive personal information
Virginia	<ul style="list-style-type: none">• Right to opt-out of targeted advertising• Right to opt-out of the sale of personal data• Right to opt-out of profiling• Opt-in consent for sensitive data
Colorado	<ul style="list-style-type: none">• Right to opt-out of targeted advertising• Right to opt-out of the sale of personal data• Right to opt-out of profiling• Opt-in consent for sensitive data
Utah	<ul style="list-style-type: none">• Right to opt-out of targeted advertising• Right to opt-out of the sale of personal data• Right to opt-out of processing sensitive data
Connecticut	<ul style="list-style-type: none">• Right to opt-out of targeted advertising• Right to opt-out of the sale of personal data• Right to opt-out of profiling• Opt-in consent for sensitive data

ADDITIONAL DISCONNECTS

Sale

- **CPRA** – means selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to a third party for **monetary or other valuable consideration**.
- **VA** - means the exchange of personal data for **monetary consideration** by the controller to a third party.

ADDITIONAL DISCONNECTS

Consent

- **CT** - means a clear affirmative act signifying a consumer's **freely given, specific, informed and unambiguous agreement** to allow the processing of personal data relating to the consumer. "Consent" may include a written statement, including by electronic means, or any other unambiguous affirmative action. "Consent" does not include (A) acceptance of a general or broad terms of use or similar document that contains descriptions of personal data processing along with other, unrelated information, (B) hovering over, muting, pausing or closing a given piece of content, or (C) agreement obtained through the use of dark patterns.
- **UT** - means an affirmative act by a consumer that **unambiguously indicates the consumer's voluntary and informed agreement** to allow a person to process personal data related to the consumer.

ADDITIONAL DISCONNECTS

Dark Patterns

- **CPRA** - means a user Interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice
- **CO** - means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice
- **CT** - (A) means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making or choice, and (B) **includes, but is not limited to, any practice the Federal Trade Commission refers to as a "dark pattern"**
- **VA, UT** – None

ADDITIONAL DISCONNECTS

Global Privacy Controls / Opt-out preference signals

- **CPRA** – See regulations
- **CO** – **Effective January 1, 2024**, consumers can opt-out of targeting advertising and the sale of data via “a **user-selected universal opt-out mechanism**.”
- **CT** - **Not later than January 1, 2025**, allowing a consumer to opt out of any processing of the consumer's personal data for the purposes of targeted advertising, or any sale of such personal data, through an **optout preference signal** sent, with such consumer's consent, by a platform, technology or mechanism to the controller indicating such consumer's intent to opt out of any such processing or sale
- **VA, UT** - None

CPRA DRAFT REGULATIONS

May 27, 2022

- Process

Opt-out preference signals must be honored

“Symmetry in choice”

Throws shade on cookie banners

Relaxing use of agents



ENFORCEMENT

CPRA – no cure period

CO - 60 day cure period (sunsets 1/1/25)

VA – 30 day cure period

UT – 30 day cure period

CT – 60 day cure period (sunsets 12/31/24)



Questions?



Use the QR code to email Gary to sign up and receive Davis+Gilbert's digital media / privacy alerts and event invitations



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Trends in Marketing Communications Law

Each year, Davis+Gilbert provides an overview of legal developments affecting the advertising and marketing industry. Lawyers in the firm's Advertising + Marketing practice share practical and helpful insights to guide businesses and agencies as they navigate these trends.



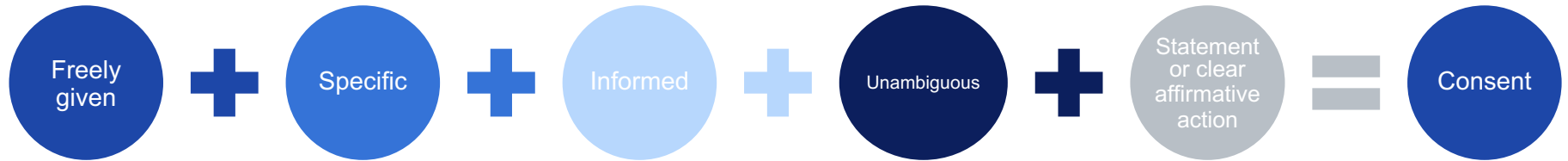
Consent and the U.S. State Privacy Laws

Michael Hahn
IAB, EVP & General Counsel

SPOKES / Summer 2022

The consent standard under U.S. state privacy laws

The nature of valid consent is consistent across the states



The consent standard under U.S. state privacy laws

The draft regulations implementing the CPRA include prescriptive requirements for obtaining consumers' consent

Provides that a business *must adhere to the following principles* when designing its consent method

- Easy to understand
- Symmetry in choice
- Avoid language or interactive elements that are confusing (e.g., double negatives or unclear toggles/buttons)
- Avoid manipulative language or choice architectures (e.g., wording that guilt or shames consumers or “bundles” consent)

Any method that fails to meet these requirements *may be considered a “dark pattern”* and *does not constitute valid consent* (Cal. Proposed Regs. § 7004(b))

Obtaining opt-in consent through a network framework would not satisfy the laws' requirements

Network approach does not meet the consent standard

- Network-based opt-in approach is intended to obtain a consumer's consent to cross-site tracking across a network of participants
- Valid consent must be **“specific,” “informed,” and for “a narrowly defined particular purpose”** (see Cal Civ. Code § 1798.140(h); CPA § 6-1-1303(5); CTDPA § 1(6); UCPA § 13-61-101(9); VCDPA § 59.1-571)
 - A network approach cannot provide a consumer with the requisite level of notice that must, under each law, be provided by publishers on their digital properties prior to collection
 - Bundling consent across a network would mean that it is likely not “narrowly defined”
- The CPRA calls for any link that allows a consumer to opt in to **apply only to the business with which the consumer intends to interact** (Cal Civ. Code § 1798.185(a)(20))

Obtaining opt-in consent through a network framework would not satisfy the laws' requirements

Network approach is inconsistent with the structure of the laws

- Structure of the state privacy laws ***assigns the business/controller with the responsibility to effectuate a consumer's rights*** because it has the direct relationship with the consumer
 - The CA Attorney General's Office made clear that those obligations cannot be delegated to third-party pages because they are not designed to effectuate the rights set forth in the CCPA
 - A network-based opt-in followed by a site-level opt-out would be confusing to consumers and could even constitute an unlawful "dark pattern" (see Cal. Proposed Regs. § 7004(a)(3); CPA § 6-1-1303(5)(c); CTDPA § 1(6))

Obtaining opt-in consent through a network framework would not satisfy the laws' requirements

Network approach does not meet the notice requirements under state privacy laws

- Network-based opt-in approach is inconsistent with the **requirement that a controller “clearly and conspicuously” disclose** its processing of a consumer’s personal data for cross-site ad targeting (see CPA § 6-1-1308(1)(b); CTDPA § 6(d); VCDPA § 59.1-574(D))
- The CPRA and the draft regulations set forth **prescriptive notice requirements imposed on each business**, which cannot be circumvented through a network-based opt-in approach
 - Notice at collection requirements are intended to provide consumers with the ability to exercise “meaningful control” over a business’ use of their personal information; such notice must equip consumers with “all the information necessary to choose whether or not to engage with the business” and be “readily available where consumers will encounter it” (Cal. Proposed Regs. § 7012(a)-(c))
 - A notice and consent model across a network of publishers and their ad tech partners can never provide “all the information necessary,” because such information can only be conveyed on a site-by-site basis
 - Notice on one publisher’s site on behalf of an entire network or on a network page is not “at or before the point of collection” (Cal. Proposed Regs. § 7012(a))

Obtaining opt-in consent through a network framework would not satisfy the laws' requirements

Network approach does not meet the notice requirements under state privacy laws

- The California draft regulations provide **that each business must provide details about third parties** when they “control” the collection of personal information on the business’ page (Cal. Proposed Regs. § 7012(g)(2))
 - A consumer can only make a meaningful choice concerning the third parties that control the collection on each first party’s page; a network-based approach is not compatible
- A network opt-in consent framework likely **would not provide a consumer with the “symmetry in choice”** the draft regulations implementing the CPRA requires (Cal. Proposed Regs. § 7004(a)(2))

The only exception is for opt-out preference signal

The relevant statutes provide for only one exception to the consumer making elections on the first party page – out-out preference signal

- Certain laws provide that a consumer’s opt-out right **may be exercised through a preference signal** (instead of via a link provided by a business/controller on its website)
 - The California draft regulations state that a business **must process opt-out preference signals** and may do so in either a “frictionless” or “non-frictionless” manner (if the processing occurs in a “frictionless” manner, the business is not required to provide an opt-out link on its internet homepages) (Cal. Proposed Regs. § 7013(d); § 7025(e))
 - The Colorado and Connecticut laws state that a controller **must allow a consumer to opt out through an opt-out preference signal** by July 1, 2024 and January 1, 2025, respectively (CPA § 6-1-1306(1)(a)(IV)(B); CTDPA § 6(e)(1)(A)(ii))
- These laws also provide that any platform, technology, or mechanism used to send a consumer’s opt-out preference signals must, among other things:
 - **not unfairly disadvantage** other parties
 - **not make use of default settings**
 - be **consumer-friendly and easy to use** by an average consumer
 - enable the party processing the signal to **determine a consumer’s state of residence** (see Cal Civ. Code § 1798.180(19)(A); CPA § 6-1313(2); CTDPA § 6(e)(1)(A)(ii))

Operationalizing All of It

Jennifer Garone

Sr. Director, Privacy at Carnival Corp.



Bringing it to Life in your Organization

Basics!

Consent management; Notice; Data mapping and inventories

Risk assessment and business decisions

Third Party management

Technology to enable

Internal Communications and Company Dynamics

Questions?



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