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U.S. Privacy Rulemaking: Common Themes and Policy Issues

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State Privacy Rulemaking

The Rule Makers



California

California Privacy
Protection Agency

Colorado

Attorney General

Timeline of Activity



Nov 2021:
CPRA
Comments
Filed

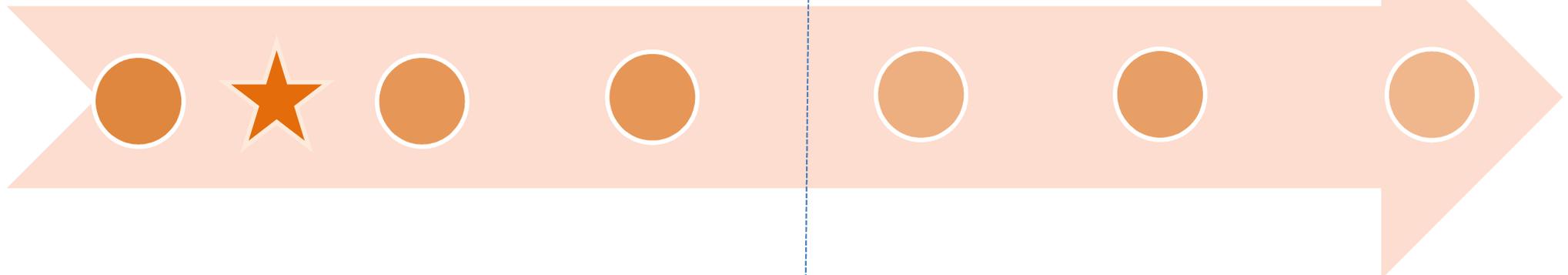
July 1, 2022:
Deadline for final CA
regulations (but likely
delayed to Q3-Q4)

July 1, 2023: CO law
takes effect and deadline
for final opt-out
regulations

Q2-Q3: CPPA
informational
hearings

Jan 1, 2023:
CPRA takes
effect

Jan 1, 2025: CO
deadline for good
faith reliance
defense regulations



Universal Opt Out (CA & CO)



	California	Colorado
Optional?	Optional	Mandatory July 1, 2024
Standards	<ul style="list-style-type: none"> • Must be consumer-friendly, clearly described, and easy to use • Can't unfairly disadvantage another business and must be technology neutral • Must clearly represent consumer's intent and can't have defaults • Can't require more info than is necessary • Shouldn't conflict with other commonly-used privacy settings • Must be able to selectively consent for one business without affecting preferences for other businesses or global opt-out • Prescriptive language and scope • Restrictions on degrading functionality, charging a fee, suggesting products or services won't function properly or fully, using banners or "other intrusive designs" that interfere with consumer experience, etc. 	<ul style="list-style-type: none"> • Must be consumer-friendly, clearly described, and easy to use • Can't unfairly disadvantage another business • Can't be a default - must be affirmative, freely given, unambiguous opt-out choice • Must allow authentication of consumer and request • Should be as consistent as possible with other US methods
Children	<ul style="list-style-type: none"> • Specifications to signal age 	Statute doesn't apply to the extent business complies with COPPA

Automated Decisionmaking (CA)



What constitutes ADM technology and profiling?

What “meaningful information about the logic” involved in ADM must be provided in response to access requests?

Scope of opt-out rights and process

Other Consumer Rights (CA)



Correction Right

Access Right and
“Specific Pieces”
of Personal Info

Limiting Use and
Disclosure of
Sensitive Info

“Dark Patterns” (CA)



"Dark pattern" means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, as further defined by regulation.

Business Purposes for which data
from different sources can be
combined

Audits and Risk Assessments (CA)



Annual Cyber
Audits

Regular Risk
Assessments

Compliance
Audits by
CPPA

FTC Privacy Rulemaking

Unified Regulatory Agenda (2021)

Considering a Making a Trade Regulation Rule to address

- “abuses stemming from surveillance-based business models,”
- “lax security practices,”
- “limiting intrusive surveillance,” and
- “ensuring that algorithmic decision-making does not result in unlawful discrimination.”

Trade Regulation Rules Generally



- **FTC may prescribe “rules which define with specificity acts or practices which are unfair or deceptive.”**
 - **Magnuson-Moss Warranty and FTC Improvement Act of 1975**
 - **Response to uncertainty as to the FTC’s authority to make rules imposing substantive business conduct requirements.**
 - **The FTC Improvements Act of 1980 subsequently modified this authority in response to perceived overreach by the agency.**
- **Civil penalties: \$43,792 for each violation.**
- **Examples: Credit Practices, Funeral Rule, Care Labeling, Picture Tube Rule**

What the FTC Must Show



To support any Trade Regulation Rule, the FTC must:

- Explain the need for and the objectives of the Trade Regulation Rule;
- Describe all of the alternatives considered by the Commission (including all of the alternatives suggested by commenters);
- Set forth the specific practices that the Commission believes to be unfair or deceptive; and ...

What the FTC Must Show (Cont'd)



To support any Trade Regulation Rule, the FTC must:

- Adduce substantial evidence that the practices to be prohibited are
 - *Prevalent*, based on agency enforcement actions or other market information indicating a widespread pattern of unfair or deceptive practices;
 - *Likely to mislead* a reasonable consumer to his or her detriment, or
 - Are likely to cause *substantial and unavoidable injury* (especially monetary injury) that is *not outweighed by offsetting benefits* to consumers or competition; and
- Demonstrate the prohibition of these practices best achieves the agency's goals, provides greater benefits, and imposes fewer costs than any of the alternatives considered.

Procedural Requirements



The FTC must

- issue an ANPR before commencing a rulemaking proceeding,
- submit rulemaking notices to the relevant Congressional Committees before publication,
- allow for informal hearings by interested parties, including rights of cross-examination and rebuttals with respect to disputed issues of material fact.

Trade Regulation Rules take a long time: on average six years

Questions + Contact



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