BEFORE THE CALIFORNIA PRIVACY PROTECTION AGENCY

California Code of Regulations, Chapter 1 California Consumer Privacy Act Regulation

Title 11, Div. 6 (§§7000-7304)

**Comments on Proposed California Consumer Privacy Act Regulations**

The Association of Test Publishers (“ATP”) submits these comments to address the concerns of the testing industry related to the California Consumer Privacy Act Proposed Regulations (“Proposed Regulations”), as published on July 8, 2022. This submission is being made by the required date of August 23, 2022.

The ATP is the global trade association for the assessment and learning industry. The ATP is comprised of hundreds of publishers, test sponsors (i.e., developers/owners of test content, such as certification bodies), and vendors that deliver tests used in various settings, including employment (e.g., employee selection and other HR functions), education (e.g., academic admissions), clinical diagnostic and other healthcare assessments, certification/ licensure (e.g., licensure/recertification of various professionals), and workforce credentialing, as well as businesses that provide testing services (e.g., test security, scoring) or administer test programs (collectively referred to herein as “Members”). Since its inception in 1987, the Association has advocated for the use of fair, reliable, and valid assessments, including ensuring the security of test content and test results. Our activities have included providing expertise to and lobbying the US Congress and state legislatures on proposals affecting the use of testing in employment and education, as well as representing the industry on regulatory matters and litigation surrounding the use of testing. The ATP developed and currently publishes compliance guidelines on the EU General Data Protection Regulation (“GDPR”) and are currently publishing a series of educational bulletins entitled “Privacy in Practice” that focus on compliance with both U.S. and international privacy laws and regulations, including the California Consumer Privacy Act (“CCPA”). The ATP also plans to publish a bulletin on these Proposed Regulations when final.

The ATP respects the goals the California Consumer Privacy Agency (the “Agency”) is expressing in the Proposed Regulations to provide for comprehensive implementation of the California Privacy Rights Act (“CPRA”), amendments to the California Consumer Privacy Act (“CCPA”), and to provide guidance to covered businesses that must comply. However, we strongly believe that specific circumstances common in the testing industry, which are shared by many smaller/medium-sized businesses in other industries, justify modification of the Proposed Regulations when balanced against the rights of individual test takers as consumers. Accordingly, the ATP urges the Agency to take these specific comments into account in adopting final regulations.

**GENERAL BACKGROUND: ATP Members and the Assessment Industry**

Many testing events occur that greatly benefit and protect the public, along with those who rely on test results, especially individual test takers. California consumers are no exception to the vast – and growing – population of users of assessments whose purpose is to advance themselves personally and/or professionally.[[1]](#footnote-1)

Individuals voluntarily participate in testing for many reasons. Among them is to obtain a driver’s license, to identify ways to improve their lives, to understand their academic strengths and weaknesses, to gain admittance to an institution of higher learning or other academic/adult educational program, to seek employment or to gain a promotion once employed, to become licensed/certified in a profession, to become certified in sport/recreation (e.g., flying, scuba) or professionally (e.g., IT certifications in literally thousands of technical skills), and even to understand their own health (e.g., diagnostic tests) or how to provide lifesaving procedures on others (e.g., CPR). In a majority of these instances, assessments are pivotal to a public interest and/or consumer protection motive (e.g., medical, legal, accounting, airline pilot, police, EMT).

Many of these situations involve the use of “high stakes” secure testing, i.e., where the outcome of a test carries a significant consequence for the test taker (such as a securing a job, getting admitted to a school, or being issued a license or certificate). In these cases, the test items are kept secure (even by the U.S. Copyright Office, which has separate copyright registration procedures for secure tests)[[2]](#footnote-2) to ensure that future test takers cannot obtain advance knowledge of them – which would have the effect of invalidating the test results. In fact, if some test takers are able to obtain favorable results on a test by cheating, then the value of the testing program is completely undermined for everyone. Testing has become part of our daily lives; individuals generally well understand that testing provides them with benefits, directly or indirectly, by assisting to serve the public health, safety, and welfare of the community or society as a whole.

Thus, it is vitally important for every testing organization, particularly those using high-stakes tests, to ensure that its online registration process can be conducted in accordance with the CCPA, the CPRA Amendments and these Proposed Regulations, so that all test administrations, whether conducted in person or online, are fair to all test takers. In so doing, a testing organization must be able to ensure that an individual who takes a test is in fact the same individual who is registered to take the test (with or without establishing that s/he is eligible to take the test). Furthermore, testing organizations must monitor testing events to ensure that administration irregularities which may have an adverse impact on every test taker are detected and handled in an appropriate manner.[[3]](#footnote-3) Equally important, testing organizations seek to ensure that all personal information collected from test takers (i.e., “consumers”) is protected from unauthorized access and/or acquisition, and that all privacy-related requests from consumers are handled appropriately under the terms of the relevant laws. For all of these reasons, the ATP submits that every high-stakes testing organization shares the following legitimate purposes associated with the need for collecting and using the personal information of test takers: (1) to ensure fairness in testing; (2) to prevent fraud (i.e., cheating) by individuals taking a secure test; and (3) to protect proprietary (and often copyrighted) secure “high stakes” test items from being stolen by test takers and illegally distributed to future test takers.

Consistent with the above objectives, the ATP notes that many high-stakes testing programs are national in scope, drawing test takers from every state.[[4]](#footnote-4) For ease of business operations, ATP Members often adopt a uniform Privacy Policy to meet the needs of all test takers across the United States. Given that the CCPA has been in effect, we understand that many testing organizations have already modified their privacy policies to meet the CCPA requirements. Thus, it is very important for ATP Members to continue to be able to manage their operations to address all aspects of the CCPA and CPRA, while complying with other applicable state privacy laws. Through these comments, the ATP has addressed testing-specific issues to highlight interpretations and recommended ways to modify the Proposed Regulations.

**General Background – Roles and Responsibilities in Testing**

At the outset, the ATP needs to point out that a majority of the high stakes testing programs (e.g., in employment, education, certification/licensure) do NOT rely on a traditional two-party business relationship, where a consumer has a direct relationship to the business that is selling goods or services (e.g., going into a store or online to make a purchase directly from a seller). To accomplish smoothly functioning and efficient operations to serve their customers, many testing organizations have segmented their operations into two or more diverse roles in the provision of testing services: one entity that owns the test (that may have developed the test or contracted for its development) and makes all of the decisions about how to use any personal information obtained from an individual test taker; and one or more secondary entities that actually handle the delivery, administration and scoring of the testing services. It is such a secondary entity that in many instances is the one that actually has the direct contact with the test taker/consumer. Furthermore, there often are other parties who provide supporting services to either or both of the two principal businesses (i.e., function as a “service provider” under the CCPA). The ATP applauds the current CCPA regulations, which strongly support the role of service providers in dealing efficiently with privacy concerns on behalf of the controlling business. The final CPRA regulations must equally recognize that any business that functions as a “service provider” does not control the collection and use of consumers’ personal information.

Another unique factor of the high stakes testing industry is that “consumers” of tests and testing services may be individuals, but in many instances, the rights to use tests and/or testing services are “sold” to businesses (i.e., employers) or professionals (e.g., doctors, psychologists), who then have the responsibility to arrange for the administration of the tests to the actual test takers, either by themselves or by a test delivery vendor. In this context, then, it is equally important to note that, especially for “secure tests” (i.e., those tests whose items must not be made available to test takers in advance of a test administration), the tests themselves are not “sold” in the commercial sense but are provided for use by the customer of the testing services – in this sense, then, ownership of the tests is not conveyed in a commercial “sale.”[[5]](#footnote-5) Indeed, in many instances, the testing organization provides “scoring services” to the employer or professional test user – it is often the employer or test user who has the right to decide what personal information is collected and how it is used.

Perhaps because of the complexities inherent in the provision of testing services, the standard practice for most testing organizations is the use of a formal test taker form/agreement to spell out to each individual test taker both his/her rights and responsibilities related to the testing services (e.g., rights to challenge or appeal, retest rules, prohibitions on copying/sharing test items), as well as the information about the business’s privacy policy, which the

must acknowledge or accept.[[6]](#footnote-6) Among the uses of personal information that may be enumerated in such agreements are specific steps taken to ensure that cheating does not occur (e.g., monitoring test administration either physically or electronically). Many testing organizations require the test taker to sign this agreement first when registering online for the test and then again at the test administration before the test taker begins the testing session, which provides evidence that the test taker was given the required notice twice.

Because of the well-documented division of responsibilities among different entities participating in a testing event, the most critical issue in a privacy context is which entity has the responsibility for collecting personal information from test takers and for determining what use(s) are to be made of that information. While the high-stakes test owner may obtain test taker information from one or more of its service providers in the performance of the testing services, the responsibility for compliance with the CCPA/CPRA must fall squarely on the test owner, the entity that makes all of the relevant decisions about what personal information should be collected and what uses it makes of that personal information.[[7]](#footnote-7) However, as noted, in other instances, it is the test user (e.g., employer, professional, institution) that makes those decision and therefore must be treated as the “covered business” or “controller.”

Equally pertinent to this control issue is the key distinction between test takers’ personal information (e.g., name, address, email address) and the outcome of testing services purchased by test takers – the test results or scores. Although it may be appropriate in some situations to recognize that the answers to test items written down by a test taker are “personal” to that individual, test results/scores are not “collected” information.[[8]](#footnote-8) Test results/scores are the product of the test services procured by the consumer; they are not information collected from test takers,

but are derived outcomes produced by the testing organization using proprietary scoring rubrics.[[9]](#footnote-9)

Moreover, the uses of test results/scores are co-extensive with the need of each test taker for the testing services. In other words, if an individual is seeking a license/certificate documenting a particular skill (e.g., in law, medicine, technology), the issuer of that license/certificate is the owner of the test and the outcome is based on the individual’s test results/score; similarly, if an individual is seeking a job or a promotion, that decision is made by the employer, based upon various factors, including the individual’s test results/scores. Application of overly-prescriptive privacy requirements on the sharing of an individual’s test results/scores defeats the very purpose the person has in taking the test in the first place.[[10]](#footnote-10)

The ATP has presented this background information on the roles and responsibilities experienced in the assessment/learning industry as a framework within which to address specific Proposed Regulations in the following comments.

**Comments on the Proposed Regulations**

1. **Authorized Agent**

The Agency proposes to delete the requirement that an “Authorized Agent” is registered with the Secretary of State, apparently intending that a consumer would be able to authorize anyone to act on their behalf.[[11]](#footnote-11)  Moreover, Section §7063(b) of the Proposed Regulations regarding “Authorized Agents,” states that: “A business shall not require a power of attorney in order for a consumer to use an authorized agent to act on their behalf.” We also note that the authorized agent is only required to implement and maintain reasonable security procedures and practices to protect the consumer’s personal information (*see* §7063(c)).

The ATP has serious concerns about these revisions because they would make compliance significantly more onerous as the volume of individual rights requests will increase and may also lead to a corresponding increase in fraudulent or spamming-like activities that businesses have already experienced under CCPA from groups that send thousands of requests claiming to be authorized by individuals without providing any proof of authorization. Scores of covered businesses have received and continue to be subject to the onslaught of these requests. Some of these requests are not legitimate requests from individuals but from spam-like organizations and others not acting in good faith. The ATP urges the Agency not to revise the current definition but rather to expand the regulations to impose more obligations for these “authorized agents” to provide proof that they are in fact authorized and are acting legitimately on behalf of individuals. Many testing organizations have been inundated with these illegitimate requests that require significant time and resources to attempt to verify, investigate, and resolve. Proposing to remove the requirement that these “agents” are registered with the Secretary of State will result in businesses being flooded with illegitimate, unwarranted requests.

1. **Disproportionate Effort**:

The Agency proposes to add a definition of “disproportionate effort” “within the context of a business responding to a consumer request, specifically stating the term: “*means the time and/or resources expended by the business to respond to the individualized request significantly outweighs the benefit provided to the consumer by responding to the reques*t” (*see* §7063(h)). The Agency has provided some helpful examples of when a covered business’s efforts to respond to an individual request would outweigh any harm to the individual to not acting on the request. Nevertheless, the ATP is concerned this revised definition places onerous responsibilities on businesses to demonstrate and document this balancing test. Many testing organizations also deidentify the test takers’ information after initial use, so an individual cannot be identified – and thus it is no longer personal information (*see infra.* at fn. 14). They do this because they do not use personal information for test-related research and to follow privacy by design principles including data minimization and purpose limitations. When this is the situation, this new requirement unnecessarily burdens these businesses to conduct such a balancing test, when the situation is simply that they do not any longer have the consumer’s personal information and should be able to respond as such. Accordingly, the ATP requests that the Agency revise this definition to reflect the reality of these situations.

1. **Financial Incentives**

The Proposed Regulation would define “financial incentive” as “a program, benefit, or other offering, including payments to consumers, for the collection, retention, sale, or sharing of personal information. *Price or service differences are types of financial* *incentives*” (§7063(k)). The Agency proposes to add the last sentence in this definition. This addition creates concerns where testing organizations price their products and services differently and may need additional information to process the request (e.g., when an individual wants to obtain an expediated score report, wants to cancel a score, or wants to reschedule a test). Thus, the Agency needs to modify its proposed language so that when a business legitimately differentiates the pricing for its services, it does not fall under this definition.

1. **Definition of “First Party”**

The proposed new definition of “First party” means the consumer-facing business with which the consumer intends and expects to interact” (*see* §7063(l)). As indicated in the general overview above, ATP Members, specifically test sponsors, regularly use a variety of service providers to deliver tests that interact more directly with consumers but the test itself has the branding of the test sponsor. ATP is concerned that the use of the words “consumer-facing” are inappropriate in the context of the assessment community and are likely to cause confusion amongst consumers/test takers. Instead, the ATP recommends that the Agency should focus on the formal role of the covered business as the controller of personal data, and continue to require that, if the covered business intends to delegate its responsibilities related to consumers to its service providers, it must do so through a legally binding contract which clearly provides what actions the service providers must perform to comply with the CPRA.

1. **Restrictions on the Collection and Use of Personal Information**

The Agency proposes to add a new requirement in Section 7002, notably a higher standard for consent: “A business shall obtain the consumer’s explicit consent in accordance with Section 7004 before collecting, using, retaining, and/or sharing the consumer’s personal information for any purpose that is unrelated or incompatible with the purpose(s) for which the personal information is collected or processed. The Agency has provided no definition of what would constitute “explicit consent” and therefore, this proposed language is inappropriate. The ATP contends that when a testing organization presents a legally binding agreement to a test taker prior to the testing session, which is tied to a disclosure notice and privacy policy that comply with the CPRA, the test taker’s acceptance (e.g., using a checkbox or digital signature) is legally sufficient to constitute “explicit consent.” Moreover, this is essentially the same process that is already required for a test taker to give affirmative consent to the collection and use of sensitive personal information. Therefore, the proposal to add the word “explicit” to consent should be dropped.

1. **Notice at Collection of Personal Information.**

The ATP agrees that only businesses that control the collection of a consumer’s personal information are required to provide a notice at collection. However, the Proposed Regulations in Section 7012 add complex and redundant notice requirements. We urge the Agency to modify its proposal so that a business can meet this requirement by linking directly to its privacy policy that meets the requirements of Section 7011. In Section 7011, businesses are already required to provide privacy policies that would include the same information, so including another lengthy

notice actually inhibits the goal of making it easier for the consumer to understand the business’ personal information collection and purposes and adds more complex requirements for businesses. Moreover, as noted earlier, many ATP Members have already developed global privacy programs that follow existing notice and privacy policy requirements. This proposed additional notice requirement only adds unnecessary burdens for businesses and is redundant.

The ATP also objects to the proposed requirement for employers in Subsections (j) and (k) – the CCPA does not currently apply to employment related personal information collected by employers and it is premature to anticipate any legislative change. These subsections would add requirements that are inconsistent with the existing law. We understand that the Agency states this provision would sunset if additional legislation is not passed; however, that approach is antithetical to proper regulatory process, and will cause serious confusion among employers. Thus, this requirement should not be included in the Proposed Regulations at this time.

Moreover, if a request for access to a test taker’s personal information involves any actual disclosure of the testing organization’s IP, the test taker would not be entitled to access such IP and the business will screen out all such IP from what is made available to test taker.[[12]](#footnote-12) Although we submit that federal patent, trademark, copyright, and trade secret rights are easily understood as potential “conflicts” with a consumer’s right to access, the Proposed Regulations fail to provide any explicit guidance in this area. To avoid confusion on this important point, the ATP recommends that the final regulations should provide details for how a business is permitted to deny some or all of a request when its federal IP rights conflict with the consumer’s right to access.[[13]](#footnote-13) See discussion of the impact of a testing organization’s IP (*supra*. at p. 4).

1. **Notice to “Limit the Use of My Sensitive Personal Information.”**

The ATP supports the proposed exception that a business using sensitive personal information should not be required to provide notice to limit the use of sensitive personal information when it has disclosed that such information is only for specific purposes aligned with Section 7027 (*see* Section 10, *supra.*)*.* As we have described earlier, many testing organizations readily disclose to every test taker that the use of sensitive personal information is fundamental to their provision of assessment services and to ensure that the test is fair and valid. Equally important, businesses in the assessment industry are collecting sensitive personal information to provide assessment services which test takers have contracted for (or submitted to contractually), to comply with legal and regulatory requirements, and to ensure fairness and validity to test takers in the performance of testing services.[[14]](#footnote-14)

However, for the proposed notice in Section 7014, the ATP submits that a business that is using sensitive personal information consistent with Section 7027 should NOT be required to repeat the statements in their privacy policies a second time – the consumer/test taker engaging with a testing organization can readily read and understand the “specific purposes” laid out in the privacy policy for the permitted purposes for collection (and not for any purposes other than those in Section 7027), as described above (*supra.* at p. 9, Comment 6). Thus, this additional requirement is repetitive and unnecessary.

1. **Business Practices for Handling Consumer Requests**

a). Although the ATP understands and appreciates the Agency’s efforts to help businesses operationalize consumer requests, we believe a number of the proposals to amend Article 3, Sections 7020-7028 would add significant unnecessary complexity and confusion for businesses and consumers alike. In the assessment industry, as described above *supra,* at pp. 4-5, a service provider in many instances is the first point of contact for a consumer when and if CCPA and the CPRA amendments are applicable. Thus, it is critical to recognize that in the assessment industry, where a testing organization often uses one or multiple service providers, the data controller must provide a clear delegation of responsibility for compliance, including for handling consumer requests; however, the ATP strongly recommends that the final regulations should require that only the controller should have the responsibility and obligation to resolve any test taker request, no matter if it uses a service provider as the first point of contact.

b). Beyond the basic requirement for a covered business (or controller to decide any consumer request, the ATP also notes that as proposed in Section 7022 “Requests to Delete,” a covered business would only be in compliance with consumer deletion requests if it “permanently and completely erasing the personal information on the consumer.”As shown above, testing organizations often de-identify test takers’ personal information by anonymizing it and aggregating it for research purposes, whether that is to conduct norming studies or to improve future versions of the test. The ATP recommends that the Agency provide use cases to confirm and clarify these situations.

c). The CCPA makes it clear that a business is free to collect, use, retain, sell, or disclose consumer information that is de-identified or aggregated. *See* Cal. Civ. Code §1798.140(o)(2). The ATP submits it would be helpful for the final regulations specifically to provide examples explaining appropriate uses of such information, including uses in testing, where anonymous personal information has been de-identified and is then aggregated so that no information identifying the consumers is shared or disclosed (*see* fn. 14). Most often, testing organizations include disclosure of such research uses of some personal information on an anonymous and aggregated basis in the test taker agreement, so that they do not have to go back to test takers a second time with a new notice.

d). The ATP strongly supports the Proposed Regulations that permit businesses, service providers, and contractors to delay the deletion of personal information if the requested personal information is archived or in backups. However, the ATP requests additional guidance from the Agency to clarify when it generally should be considered appropriate to keep archived data, which we contend could exist for a multitude of reasons (e.g., to resolve test scoring/reporting challenges, on behalf of testing customers who request extended retention). We recommend that businesses be permitted to archive/backup when they provide a legitimate, documented purpose for doing so. As indicated in Section 7022(d) “If a business, service provider, or contractor stores any personal information on archived or backup systems, it may delay compliance with the consumer’s request to delete, with respect to data stored on the archived or backup system, until the archived or backup system relating to that data is restored to an active system or is next accessed or edited for a sale, disclosure, or commercial purpose.”

e). The ATP again urges that the Agency should impose fewer burdens on businesses, service providers, and contractors with regard to consumers’ “Request to Correct.” In Section 7023 (b), “a business may deny a consumer’s request to correct if it determines that the contested personal information is more likely than not accurate based on the totality of the circumstances.” A long list of factors is provided to help businesses make this determination. However, testing organizations have been encountering requests made in bad faith or that actually represent attempts to circumvent testing fairness and validity procedures. Of particular concern is Subsection (2) that indicates “If the business is not the source of the personal information and has no documentation to support the accuracy of the information, the *consumer’s assertion of inaccuracy* may be sufficient to establish that the personal information is inaccurate.” For the use of assessments to issue certifications and credentials, and other services offered by ATP Members, scores, results, reports, inferences, etc. based on the consumer’s responses, acts, or writings may come from service providers or contractors who are a critical element in the assessment or credentialing process. To permit a mere “consumer assertion” to control the decision to delete personal information would have potentially devastating consequences on a testing organization’s assessments and related products and services. The ATP is very concerned that the business must “rebut” the test taker’s/consumer’s assertions which go to the very heart of the testing psychometric process, developed by and under the professional control of the testing organization, even if it is carried out by a service provider. The proposal would place an extremely onerous and complex burden on the testing organization to overcome a mere “assertion” and we urge the Agency to remove it from the Proposed Regulations.

f). Similarly, the ATP is very concerned about the obligations imposed on businesses in Section 7023 (f)(4) of the Proposed Regulations related to a consumer’s request to correct about a consumer’s health: “if a business rejects a request to correct concerning a consumer's health, *the right of a consumer to provide a written addendum to the business with respect to any item or statement regarding any such personal information that the consumer believes to be incomplete or incorrec*t. The proposal would limit such an addendum to 250 words per alleged incomplete or incorrect item and shall clearly indicate in writing that the consumer requests the addendum to be made a part of the consumer's record. The ATP objects to this requirement. For example, when a health-related assessment is involved, the test results/outcomes are NOT personal information supplied by the individual test taker, but rather are derived by the testing organization (or the clinician using the test) – it is not appropriate to enable the test taker to challenge test results that are fundamental to the need for the test; this is akin to saying a student may challenge the score on a math test by alleging that the actual results should be different. The second example showing the error of the proposed regulation occurs when the test taker has provided information to support a request for an accommodation; in this case, the testing organization has provided a fixed process by which a test taker is permitted to appeal an adverse decision about whether an accommodation is granted. It would be wholly inappropriate for the Agency to use the Proposed Regulation to intrude into those Americans with Disabilities Act (“ADA”) issues.

g). The ATP supports subsection (h) that permits businesses to deny fraudulent or abusive requests, “if it has a good-faith, reasonable, and documented belief that a request to correct is fraudulent or abusive.” The business shall inform the requestor that it will not comply with the request and “shall provide an explanation why it believes the request is fraudulent or abusive.” However, Subsection (j), which requires a business to provide all of the consumer’s PI to show what was corrected, is unnecessary and repetitive. This requirement would be very burdensome and resource intensive for businesses, especially where testing organizations, along with its service providers, may process voluminous information on any one consumer for valid test administration purposes – and it again risks exposing a test taker’s PI to another avenue of disclosure. To require such extensive disclosure is incredibly burdensome and, to the extent, the organization has already responded to the consumer’s “right to know” request, it is repetitious.

h). For Subsection 7024 “Right to Know,” the ATP supports directing the consumer to the business’ privacy policy when the consumer’s identity cannot be verified. A testing organization is already required to include detailed descriptions of categories of information collected, the purpose, etc. in its Privacy Policy, so a consumer can easily understand its privacy practices.

i). The ATP objects to Subsection (h) because this provision would require a business to provide records for longer than 12 months from the request date unless it can show the request causes an impossible or disproportionate effort. Requiring a covered business to provide a “detailed explanation” about why it cannot meet this requirement is yet another complex and onerous burden to meet, especially in light of the voluminous requests many testing organizations have been receiving.

In this regard, as we described in the beginning of our comments, the Agency should be aware that there have been increasing requests, including ones that are often misguided and disingenuous attempts by some vendors, researchers, and graduate students, to exercise their individual rights in ways that flood testing organizations with requests not only about the test taker’s “right to know” but also for deletion, copies, etc. There has been a significant uptick in these types of requests, which have already become an overwhelming burden for testing organizations.[[15]](#footnote-15) In fact, there is apparently no cut-off date for when a business needs to go back to provide available personal information. For testing organizations, where individuals may test several times over extended periods of time, such a proposed regulation would require looking back well beyond one year, covering multiple testing events. It is equally possible that application of the proposed regulation would be inconsistent with the testing organization’s existing retention policy for test takers’ personal information.Accordingly, the ATP urges the Agency to remove both the requirement that businesses must provide a detailed description about why the request was denied beyond lack of verification, and that businesses should be required to look back beyond 12 months for any individual’s personal information. While the ATP believes that no business should be required to respond to requests for more than a one-year period of time, at a minimum, the Agency should modify its proposal to require the individual requester to identify the specific time frame within which the person is seeking information if it is outside of one year’s records, so the business is able to focus its response on a clearly defined time period.

1. **Section 7025 Opt-out Preference Signals and Section 7026 Opting out of Sale/Sharing**

In general, testing organizations are NOT selling or sharing consumers’ personal information – their use of PI is internal (e.g., research to establish test norms or to improve the tests themselves) or is shared with service providers under contract in the performance of testing services. However, in some instances, a testing organization may use data analytics service providers to assist with operations of their websites and testing platforms. In these instances, the business would have an agreement with an analytics service provider and this still would not constitute any “sale” or “sharing” of personal information so long as the contract limits any use of PI by the service provider beyond the purposes disclosed by the controller.

Moreover, some testing organizations may include on their websites’ social media widgets where a user can click on these to share information about the business’s products and services or to communicate with other interested individuals/groups. In these circumstances, the consumer/test taker chooses to interact with those third-party sites and, generally speaking, the business notifies consumers in its privacy policy that any third-party links are subject to that third party’s privacy policy and notices. We recommend that the Agency provide additional use case examples in the Proposed Regulations that confirm that these situations are exempt from the opt-out and notice requirements.

1. **Section 7027. Requests to Limit Use and Disclosure of Sensitive Personal Information**.

The ATP supports Section 7027 of the Proposed Regulation that businesses are not required to provide these notices, nor honor requests to limit use and disclosure of sensitive personal information when used in accordance with the allowed purposes indicated in Subsection (1). ATP Members, as noted earlier, use sensitive personal information for test administration and other purposes that generally are reasonably expected by their customers and test takers and for the other purposes specified in Subsection (l). The ATP also believes that there are other legitimate purposes for use of sensitive personal information that may not be listed in this Subsection, including to prevent fraud, to ensure fairness in testing, to respond to government or law enforcement orders, etc. (e.g., to comply with the EEOC *Uniform Guidelines [see fn. 14, supra.],* in response to growing data requirements under various Diversity, Equity, and Inclusion initiatives). Accordingly, the ATP requests that the Agency should add to this subsection (l) another category for purposes where the covered business can use its reasonable discretion to use sensitive data and also to allow for its legitimate purposes, including legal bases, related to the provision of its products and services.

1. **Article 4 Service Providers, Contractors, and Third Parties**

Section 7050 indicates that service providers that would otherwise be subject to the CPRA/CCPA but that are providing services to nonprofit organizations and government agencies, are exempt under these Proposed Regulations. The ATP supports this clarification to make clear that providing services to nonprofits or government agencies are NOT subject to the CPRA/CCPA. As we have noted, testing organizations often provide testing services/processing to nonprofit organizations (e.g., test sponsors) and government agencies (e.g., state school districts. state and local employers) and they have structured their compliance programs with the understanding that these organizations are not subject to the CCPA requirements. The ATP submits it would be useful for the Agency to provide some examples for clarity to prevent misunderstandings of this exemption.

In Section 7051 “Contract Requirements for Service Providers and Contractors” the Proposed Regulations proscribe extensive provisions that businesses must include in their contracts with their service providers and contractors. Testing organizations generally conduct significant and sufficient due diligence with service providers/contractors and based on that information, delegate privacy (and associated security) responsibilities under their contracts. However, the ATP objects to specific prescriptive due diligence the Agency would require of a business under the Proposed Regulations; instead, a business should be allowed greater flexibility with respect to its due diligence efforts that align with the facts and circumstances of its relationship with a particular service provider or contractor, especially if that relationship is well-established and has allowed both entities to build an agreed process/protocol for how they interact. For smaller businesses, for example, conducting an automatic annual audit where the testing organization has no evidence of any auditable issues could be a serious burden resulting in significant additional costs, which would be passed along to consumers.

Related to Section 7052 “Third Parties,” the ATP has concerns specifically with the requirement that businesses flow down requirements to the third party when the business receives a consumer request to delete or opt out of the sale/sharing, as the third party is required in subsection (c) to recognize the opt out signal. While the ATP supports the requirement for third parties to recognize the opt out signals from consumers, we do not believe that testing organizations generally have any reason to provide sensitive personal information to third parties, where the “flow-down” privacy requirements of Section 7053 would come into play. Thus, this proposal creates an unnecessary burden on businesses and from a practical standpoint it is nearly impossible to effectuate a flow-down of privacy requirements because testing organizations have little leverage over many of these third parties (e.g., social media links for test takers’ use). Indeed, most testing organizations only use analytics providers to better operate their test delivery platforms and for website operations, although they may provide links to their own social media pages where test takers can access resources and convene with peers, and where members of the testing community can interact. They do not intend for these third parties to use personal information for their own purposes and certainly do not want any personal information used for any targeted ads or marketing for the third parties and their other customers. The ATP recommends that the Agency should revise the Proposed Regulations so they directly address such third-party vendors who misuse consumers’ personal information obtained from consumers through links from a business’s website for their own purposes to target ads, marketing or other purposes that are not directly related to the intended, contracted testing services purpose.

1. **Section 7304. Agency Audits**.

The ATP urges the Agency to limit its auditing power by providing more objective criteria so businesses understand the requirements and can prepare for such audits. The majority of ATP members take their compliance with the CCPA very seriously and they will need to understand when the Agency can conduct an audit and what records or systems will be audited with more specificity. Such information will enable businesses to have the proper personnel on site to comply with the audit requests, and to respond to questions in a cooperative manner. For example, the ATP submits that the Agency should adopt audit guidelines that give businesses advance notice of an audit, except in the most egregious situations. Moreover, audits should only occur when there is strong evidence of noncompliant activities and should not be based solely on consumer complaints.

**CONCLUSION**

On behalf of the international testing and learning industry, the ATP has provided comments on the Proposed Regulations for implementing the CPRA. We have focused on a variety of unique circumstances that are common in the assessment industry which should be considered by the Agency. Additionally, we note that many testing organizations are smaller/medium-sized businesses that would be compelled to comply with more complex, onerous requirements. Together, we believe these reasons justify modification of the Proposed Regulations when balanced against the rights of individual test takers as consumers.

In summary, our recommendations center on providing a more practical, flexible approach for these Proposed Regulations, taking into consideration specific circumstances of testing organizations.  These include: (1) recommendations that requirements for authorized agents and third parties should be expanded and businesses are not themselves compelled to ensure third party compliance other than through contractual language; (2) a more practical approaches avoiding burdensome, repetitive requirements, including more flexibility for covered businesses to document the effort and due diligence of services providers and third parties; (3) modifying the definition of financial incentives that reflect legitimate prices differences; (4) greater focus on the actual businesses that control the processing of personal information instead of a first party definitional approach; (5) removal of unnecessary requirements related to explicit consent for new purposes, realistic requirements related to privacy policies and notices (for personal information and for sensitive personal information); (6) not allowing as non-rebuttable those consumer assertions and addendums related to their data; and (7) not including premature requirements related to employee data. Moreover, the ATP contends that the Agency needs to remove practices that could result in the disclosure of personal information unnecessarily and that could lead to harm to consumers, such as requiring that a covered business provide “all of the consumer’s personal information” to show what was corrected and further requiring going beyond 12 months for a “look back” period related to consumers’ information requests. This and other requirements are contrary to well established privacy principles and are onerous requirements on smaller covered businesses. Furthermore, we recommend that the Agency limit its audits of covered businesses and provide more objective criteria for such audits to allow businesses, such as those in the testing industry, to continue their good faith efforts of compliance.

We also recommend that the Agency provide more use cases to clarify the appropriate use of personal information by covered businesses, including: (1) related to IP rights and the rejection of consumer requests; (2) showing how deidentification and archiving of data meets consumers’ deletion requests; (3) how the use of analytics and social media service providers for businesses’ analytics and customer services purposes falls under the service provider requirements and is exempt from the “opt out of sharing” notice requirements; and (4) adding more examples of service providers working with nonprofits and government agencies as being exempt from these requirements.

Thank you for your attention to the important issues raised by the ATP on behalf of the global assessment industry about the Proposed Regulations implementing the CRPA by affected testing organizations located both within and outside of California. The ATP would be pleased to answer any questions the Agency may have in response to these comments, including to do so in a virtual or face-to-face meeting. For any follow up, please contact our General Counsel at the email address shown below.

Sincerely,

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1. The ATP’s comments are not intended to apply to educational testing in K-12 classrooms. However, the ATP is aware that some school admissions testing of children is done by computer, as well as career-oriented K-12 educational and vocational education programs for children. In any situation involving the testing of minors, including for medical/diagnostic purposes, the ATP expects that the controlling business would require a test taker agreement to be signed by the child’s parent/guardian, because minors do not have legal status to enter into such an agreement. The ATP urges the Agency to exempt PII already subject to the Family Educational Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g; 34 CFR Part 99) from these Proposed Regulations.
 [↑](#footnote-ref-1)
2. *See* fn 5, *i*nfra [↑](#footnote-ref-2)
3. It is important to recognize that in most high-stakes tests, the test taker is expected to answer questions on his/her own, without having advance access to test questions, receiving any assistance from another person, using reference materials or notes, or having unauthorized access to the Internet. Obviously, these high-stakes tests are unique to the specific individual taking the test – the results/scores are only intended for and relevant to the specific individual who has registered for the test and then verified to take the test. Consequently, every testing organization pays significant attention to the security of test content and test taker information, to ensure that cheating on tests is prevented so that every test taker has an equally fair opportunity to succeed. [↑](#footnote-ref-3)
4. Indeed, many ATP Members operate international testing programs, meaning that those organizations register and administer tests to test takers outside the U.S. Thus, they must operate in accordance with global privacy laws, especially the General Data Protection Regulation (“GDPR”). In those situations, many ATP Members have attempted to establish a uniform privacy policy that harmonizes the GDPR with the CCPA. It is simply impractical and unrealistic to expect an entity doing business internationally to adopt separate and distinct privacy policies for each country in which it operates (or for each state in the United States). [↑](#footnote-ref-4)
5. Secure tests are granted special copyright protection in the United States under the 1976 Copyright Act. The regulations implementing the Act define (in part) a ‘‘secure test’’ as ‘‘a nonmarketed test…” “For these purposes, a test is not marketed if copies are not sold but it is distributed and used in such a manner that ownership and control of copies remain with the test sponsor or publisher.’’ 37 CFR 202.20(b)(4). *See* 42 *Fed. Reg.* 59,302, 59,304 & n.1 (Nov. 16, 1977). The ATP contends that the final regulations must include guidance on an exception addressing the recognition of a business’s IP rights under federal law. [↑](#footnote-ref-5)
6. The ATP believes that, to the extent that a test taker form/agreement is used by a testing organization as a “point-of-collection notice,” it must meet the requirements of §999.305(a). Nevertheless, no matter how much a business tries to use “plain language” and “avoid legal jargon,” someone can always assert that a document which has legal significance fails to conform. The final regulations should be modified to include language that a notice shall be “reasonably written to achieve the goals” to ensure that a balanced approach is used to evaluate all such documents. [↑](#footnote-ref-6)
7. Some of those responsibilities may be delegated by contract to one or more service providers, who often have the direct relationship with the test takers, such as handling registration of test takers, administering the actual testing services, providing test proctoring services, and/or managing the security of the testing event. [↑](#footnote-ref-7)
8. Even “raw” data provided by a test taker is not always considered to be “personal information” or treated as personal information. In circumstances where the test taker is an employee, where the testing organization’s IP rights must take priority over a person’s test answers, and where another exemption may exist that supports a denial of a request for access to, or deletion of, information collected from the test taker, such test answers are effectively not personal information. These situations are covered in the test taker agreement (*see supra.* fn 5). [↑](#footnote-ref-8)
9. Significantly, this type of derived information is largely unique in the testing industry. Test results/scores are distinguished from consumers’ input on social media services, where an individual’s postings to the platform are then shared in the same manner and context in which they were inputted. Nor are test results/scores remotely similar to derived personal information that is generated in a marketing context, where a person’s buying patterns/behaviors are tracked and used to create a profile that is sold to other marketers. Indeed, the Proposed Regulations (at §999.305(d)), make it clear that such results cannot be “personal information at the time of collection” – obviously, test results/scores do not even exist at the time of collection of the consumer’s personal information related to the testing services. An individual acquires (or obtains) testing services when test scores are the contracted for outcome or product. What a testing organization does with those scores is governed by and disclosed to the test takers in the test taker agreement. [↑](#footnote-ref-9)
10. This is true regardless of whether the individual pays for the test; in some instances (e.g., employment, training) the employer may have paid for the test. Even when an individual pays for the test, s/he authorizes the test owner to share the results/scores with certain designated recipients (e.g., schools to which the individual is applying, jobs for which the individual is applying, certification bodies from which the individual is seeking a license or certificate). Either way, the need for a decision-maker, or multiple decision-makers, to obtain the test results/scores is precisely the reason why the individual registered for and took that test. [↑](#footnote-ref-10)
11. Proposed Regulations, §7001(h). [↑](#footnote-ref-11)
12. The protection of the testing organization’s IP is also consistent with the usual terms contained in the test taker agreement, so every test taker will have been put on notice about this restricted access. As discussed in fn. 6, *supra,* test results/scores are likely to be considered by the testing organization to be at least in part covered IP, which will result in denial/partial denial of requests that would entail disclosure of the testing organization’s IP*.* [↑](#footnote-ref-12)
13. Except in the case of trade secrets, a business that owns other IP assets will have evidence of those rights issued by the respective governmental body. The final regulations should merely require the business to provide publicly available information to justify its denial of the request. [↑](#footnote-ref-13)
14. Testing organizations use sensitive test taker information that has been anonymized and aggregated to conduct research on building test norms based on various test taker populations, such as age or gender (i.e., the standard of performance on a test, as established by testing a large group of people and analyzing their scores; in norm-referenced testing, subsequent test takers’ scores are compared with the test norm to estimate the position of the tested individuals in a predefined population with respect to the competency, skill or trait being measured). As for regulatory requirements, testing organizations providing testing services to employers must be able to enable test user employers/customers to produce evidence to the EEOC or a court showing that use of a specific test did not result in discriminatory outcomes or disparate impact on job applicants or employees in protected categories. *See Uniform Guidelines on Employee Selection Procedures,* adopted by the US Equal Employment Opportunity Commission in 1978, found at 29 C.F.R. § 1607; the *Uniform Guidelines* also have been adopted and applied by the US Department of Justice and US Department of Labor, plus other federal and state agencies, as well as followed by numerous courts including by the US Supreme Court, *see, e.g., Ricci v DeStefano,* 557 U.S., 557 (2007)*.*  Another example of the need for a testing organization to retain test taker personal information is to be able to defend itself from test taker claims of violating the Americans with Disabilities Act (*see* 42 U.S.C. $§$ 12189). [↑](#footnote-ref-14)
15. *See,* IAPP article on these requests and compliance concerns: [*Why some data subject request services create compliance concerns (*iapp.org)](https://iapp.org/news/a/why-some-dsr-services-create-compliance-concerns/). [↑](#footnote-ref-15)