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Consumer Privacy Law Fundamentals – A Changing Landscape (A Two Part Series)

Part 2: Tracking and Targeting, Sensitive Data, Use and Limitation Requirements, Biometrics, Mobile, Dark Patterns and Other Advanced Privacy Issues – Evolving Obligations and Risks

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Today's Agenda

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- Advanced State Omnibus Privacy Law Issues
  - CPRA/CDPA overview
  - Global privacy controls and the CPRA
  - Sensitive Personal Information
  - Targeted advertising and opt-out rights
    - The cookieless future
  - Regulation of automated decision-making
  - The challenge of data minimization, proportionality and retention requirements

- Other Advanced Risks
  - Biometrics
  - TCPA
    - Why consent is still important
  - Don't forget CAN-SPAM
  - Inadequate Notice / Consent Dark Patterns

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Advanced State Privacy Law Issues

Challenges for your business…

CPRA/CDPA Overview
-- breaking news! Colorado law passes

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Consumer Right	CCPA (effective)	CPRA (Jan. 1, 2023)	CDPA (Jan 1, 2023)	GDPR (effective)
Right to access	✓	✓	✓	✓
Right to confirm personal data is being processed	Implied	Implied	✓	✓
Right to data portability	✓	✓	✓	✓
Right to delete	✓	✓	✓	✓
Right to correct inaccuracies/right of rectification	×	✓	✓	✓
Right to opt-out of sales	✓	✓	✓	✓*
Right to opt-out of targeted advertising/cross-context advertising	×**	✓	✓	✓
Right to object to or opt-out of automated decision-making	✓	✓	✓	✓
Opt-in or opt-out for processing of "sensitive" personal data?	×	Opt-out†	Opt-in	Opt-in††
Right to object to/restrict processing generally	×	×	×	✓
Right to non-discrimination	✓	✓	✓	Implied
Right to appeal denial of rights requests	×	×	✓	×

*Selling personal data under the GDPR generally would require the consent of the data subject for collection and would be subject to the right to object to processing.

**However, certain data disclosures inherent in this type of advertising are arguably a "sale," subject to opt-out rights.

†Under the CPRA, consumers' opt out rights do not apply to processing sensitive personal information for certain limited purposes.

††Under the GDPR, processing sensitive personal information is allowed with explicit consumer consent or where it is otherwise justified under another recognized lawful basis.

Global Privacy Controls vs Opt-Out Preference Signals

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- CCPA Regs .315(d) requires honoring "user-enabled global privacy controls"
  - if clearly communicates intent to opt-out of sale
  - If conflicts with settings or opt-ins (*e.g.*, financial incentive) may give notice and confirmation
- CPRA .135(a) and (b) offer an option for the various opt-out rights; either:
  - Provide links in your website to an interactive webform where consumers can exercise their rights; or
  - Honor an "opt out preference signal"
  - .135(e) issue?
- Colorado law adopts a "Global Device Setting" concept

Sensitive Information: CA, VA and CO

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- What Constitutes Sensitive Personal Information?
- Challenges under CDPA and CPRA
  - CDPA and CO require freely given, specific, informed, and unambiguous consent in order to process;
  - CPRA does not require consent, but consumers have a new right to limit the use of SPI to:
    - That "which is necessary to perform the services or provide the goods reasonably expected by an average consumer"
    - specific business purposes
    - purposes authorized by CPRA regulations
- Note that SPI collected or processed *"without the purpose of inferring characteristics about a consumer"* is not subject to this right.

Sensitive Information: California & Virginia

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"Sensitive Personal Information" and Marketing: Some Examples

- Health condition/Pharma
- Affinity groups
- Language-based
- Location-based
- Household-level

Digital Advertising -- still open issues…

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- Under CCPA, is interest-based advertising a sale?
  - IAB, DAA, Google, & Facebook Compliance Programs
  - Cookie management platforms
- CPRA: Sharing for Cross-Context Behavioral Advertising
- VA: Targeted Advertising
- CO: Targeted Advertising (VA-styled definition)

Sell v. Share

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Resolving the consideration controversy…, but not all issues…

Sell	Share
"…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 another business or a third party for monetary or other valuable consideration."	"…**sharing**, 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 cross-context behavioral advertising, whether or not for monetary or other valuable consideration, including transactions between a business and a third party for cross-context behavioral advertising for the benefit of a business in which no money is exchanged**."

Cross-Context Behavioral Advertising vs Targeted Advertising

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CCBA: *The targeting of advertising to a consumer based on the consumer's personal information* ***obtained from the consumer's activity across businesses, distinctly-branded websites, applications, or services,*** *other than* ***the*** *business, distinctly-branded website, application, or service with which the consumer intentionally interacts.*

Targeted Advertising: *displaying ads to a consumer* ***where the ad is selected based on personal data obtained from a consumer's activities over time and across non-affiliated websites or online applications to predict the consumer's preference or interests****, but not …*

- *On-site activity*
- *Contextual search or view*
- *In response to request for info*
- *Measuring or reporting performance, reach or frequency*

Exceptions to Sale/Sharing

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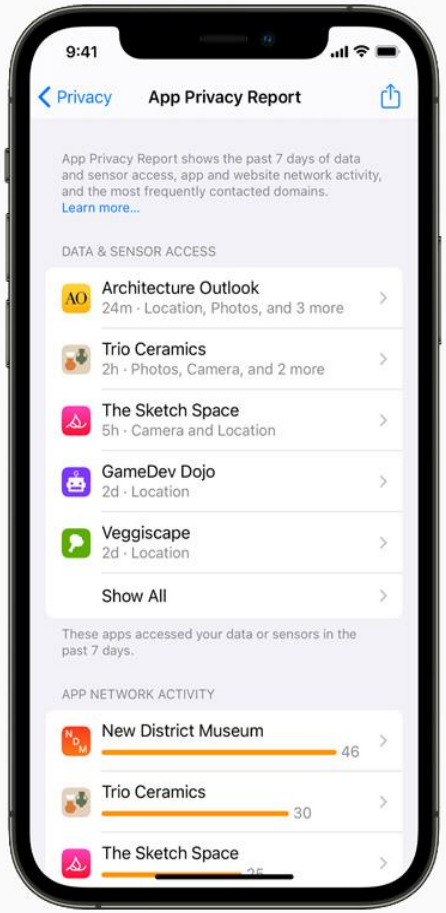
- CPRA makes opt-in to digital advertising more feasible
- Service providers: permissible purposes for SP (and new "contractor" party) processing subject to change in the regs
- Opt-out Preference Signal
- CPRA deletion claw-back
  - CPRA amends CCPA to add that a business is required to notify "all third parties to whom the business has sold or shared … personal information, to delete the consumer's personal information, unless this proves impossible or involves disproportionate effort."
  - There is no explicit obligation for third parties to delete information upon notice from the business or pass on deletion requests to their service providers, contractors, or third parties (i.e., downstream).

New Apple Rules

- Apple's iOS 14 Tracking Restrictions
  - App publishers must now obtain user opt-in to "track" a user using IDFA
  - "Tracking" includes but is not limited to:
    - displaying targeted ads in app,
    - sharing a list of emails, advertising IDs, or other IDs with a third-party advertising network to serve ads (e.g., Custom Audiences), and
    - using an SDK for ad measurement or frequency capping
- Apple iOS 15 Privacy Features
  - how often authorized apps access your data (location, contacts, photos, etc.)
  - new mail app features will make it more difficult for ad trackers to know which emails are opened
  - Siri will process speech on the device so that audio never leaves the device



Google's Privacy Sandbox: FLoC

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- Google: Announced in early 2021 its plan to phase out third party cookies on Chrome by 2022
- The alternative? Google's Privacy Sandbox known as "Federated Learning of Cohorts" or "FLoC"
- Thousands of individuals may be put into a particular FLoC, and one individual/browser may be placed into any number of FLoCs, each with an associated FLoC ID, on a dynamically and instantaneously changing basis
- Ads are then served to a FLoC ID rather than to an individual ID

“Go FLoC Yourself”

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- Purported Pros: Privacy-focused, as ad targeting is not at the individual level
- Cons/Criticisms:
  - Web activity of logged-in users (i.e., on Google accounts) still tracked on Chrome
  - Only applies to Chrome (individual tracking will continue on Android mobile)
  - Still entails intimate profiling on an individual basis
  - FLoC ID can be used in fingerprinting users and connected to PI of logged-in users
  - Major browsers (including Firefox) are refusing to adopt FLoC (MS has not taken a position)
  - Criticized as exclusionary and a grab for market share
  - Subject of antitrust lawsuit(s) against Google
- Practical Takeaway: The verdict is still out, but most advertisers and publishers should explore and test FLoC

Alternatives and Solutions: Identity Providers

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- Big Tech
- Traditional identity management and matching vendors (*e.g.,* LiveRamp), SSPs, DSPs, and Data Brokers
- Media companies, television manufacturers, financial institutions, and others
- Universal ID solutions (*e.g.*, Trade Desk's UID 2.0)

Deterministic & Probabilistic

No one partner scales to 100% for brands and publishers today. Scale requires a cocktail/portfolio of Deterministic, Probabilistic, & Contextual.

Contextual

Other Alternative Solutions

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- Bolster your first party data!
- Data Cleanrooms
  - Traditional: Facebook, Google, Amazon “Walled Gardens”
  - Decentralized Models: Snowflake, Infosum, Blockgraph
- Contextual Advertising
- Consent Management Platforms (*e.g.*, OneTrust, Ibotta and Enigma)
- Opt-in Data Brokers/Communication-Loyalty Platforms

Automated Decision-Making

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- CPRA mandates regulations "governing access and opt-out rights with respect to a business's use of automated decisionmaking technology, including profiling…."
  - "Profiling" is defined, while "automated decisionmaking technology" is not.
  - Without a definition of "automated decisionmaking technology," it is difficult to say what impact these rights will have.
- Rights under the CDPA to opt out of "profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer" would seem to be of limited benefit to consumers.
- CO: same as VA regarding legal impact

Purpose and Proportionality Limitations

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- CPRA and CDPA (and CO) introduce purpose limitations
  - Prohibit collecting additional categories of PI or using PI collected for additional purposes that are *incompatible* with disclosed purpose for which the PI was collected
  - Collection, use, retention, and sharing of PI must be *reasonably necessary and proportionate* to achieve the purposes for which the PI was collected or processed, or for another disclosed purpose that is compatible with context in which PI was collected
- Implications
  - Limits a business' ability to use PI for new purposes and retain PI longer than necessary for purposes described at collection
  - Practically requires PIAs, good data inventories, robust records retention program, and defensible destruction protocol

Retention Requirements under GDPR and CPRA

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GDPR

- Article 13: the controller at the time when personal data are obtained, provide the data subject with the following further information to ensure fair and transparent processing: 1) the **period for which the personal data is stored**, or if that is not possible, **the criteria used to determine the period**….
- Article 30: "Each controller … shall maintain a record of processing activities under its responsibility …. That record shall contain the following information: 1) where, possible the envisaged time limits for erasure of the different categories of data…."

CPRA

- 1798.100(a): A business that controls the collection of consumers' personal information shall, at or before the point of collection, inform the consumer as to: (3) **the length of time the business intends to retain** each category of personal information, including sensitive personal information, **or the criteria used to determine such period**, provided that a business shall not retain a consumer's personal information, or sensitive personal information, for each disclosed purpose for which the personal information was collected for longer than is reasonably necessary for that disclosed purpose."

Data Privacy Regulations Require Data Retention and Deletion

- Data minimization; Purpose limitation; Storage limitation
- Downstream Obligations
- Expanded Consumer Access Rights
- Legal & Third-Party Obligations
- HR & B2B Coming into Scope

Potential Disclosure Format of Privacy Notice with Retention Periods

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Company X California Privacy Notice

….

a) Collection, Purpose, Retention and Sharing

Based on our 2020 data practices, the following chart explains the categories of PI collected and the categories of recipients with which we shared each category of PI.

Category of PI	Purposes	Retention Period
Identifiers - Name, postal address, Internet Protocol address and email address.	1. Performing Services 2. Short-term Transient Use (e.g., to serve contextual ads)	1. For as long as services are performed, thereafter 4 years for records keeping or as otherwise required by law or legal process 2. Only as needed to complete the transient use, typically less than a day
Geolocation Data - Approximate physical location	?	?
Sensory Data - Audio recordings of customer support calls.	?	?

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Other Advanced Risks

Biometrics

- Notice
  - CPPA/CPRA/CDPA
  - NYC law on on-premises notice
- Sensitive PI under CPRA and CDPA
  - Do exceptions apply to consent?
- Specific Biometric Consent and Protection Laws
  - BIPA (IL) - PRoA
  - TDPA (NYC) – PRoA
  - NYC Admin. 22-1201 - PRoA
  - CUBI (TX) – No PRoA
  - WBPA (WA) – No PRoA
- Labor Laws
  - NY Labor Law 201-a prohibits fingerprinting
    - Beware time cards
  - EEOC / Discrimination
- Security and Breach Notification

50,000 Foot View on Express Consent

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- **TCPA** –Requires "express consent" to use automated technology and prerecorded/artificial voices to contact consumers for *any* purpose
  - Prerecorded/artificial voices are always covered by the TCPA and require consent in most instances
    - Exception: limited number of pre-recorded calls to landline numbers permitted for *non-marketing* purposes
    - Includes RVM, VM, IVR
    - May include calls that begin with pre-recorded snippet ("Call may be recorded" etc.)
  - Scope of automated technology covered by the TCPA drastically reduced by *Facebook*
    - Should be viewed primarily as a litigation shield for now
    - But opportunities to increase text engagement now exist
- **DNC Rules**– Require "express permission" to contact residential numbers on the National DNC using *any* dialing mechanism for marketing purposes.
  - Inquiry and EBR are also potential defenses

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The World of the Telephone Consumer Protection Act

Different Levels of Consent Are Required Based on Type of Phone and Content of Call

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- Calls made *solely* for informational purposes require no or limited consent
  - Informational calls to residential or business **landlines** require no consent unless a pre-recorded or artificial voice is used
  - Even if pre-recorded or artificial voice is used callers may make between 3-12 attempts a month to **landlines** (depending on content of the call) without consent
  - Pre-recorded or ATDS calls or texts to **cell phones** for informational purposes require express consent but it does not need to be in writing.
    - Presumed anytime a consumer provides a phone number to the caller for a purpose "closely related" to the purpose of the call
- Calls made *in any way* for marketing purposes require EXPRESS WRITTEN consent when:
  - Call is made to a **residential** number (**cell or landline**) on the national DNC without a valid inquiry or established business relationship
  - Call is made to a **residential landline** using a prerecorded/artificial voice
  - Call is made to a **cellular phone** using a prerecorded/artificial voice *or* ATDS

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FLOWCHART—INFORMATIONAL CALLING

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INFORMATIONAL CALLING CONSENT ANALYSIS

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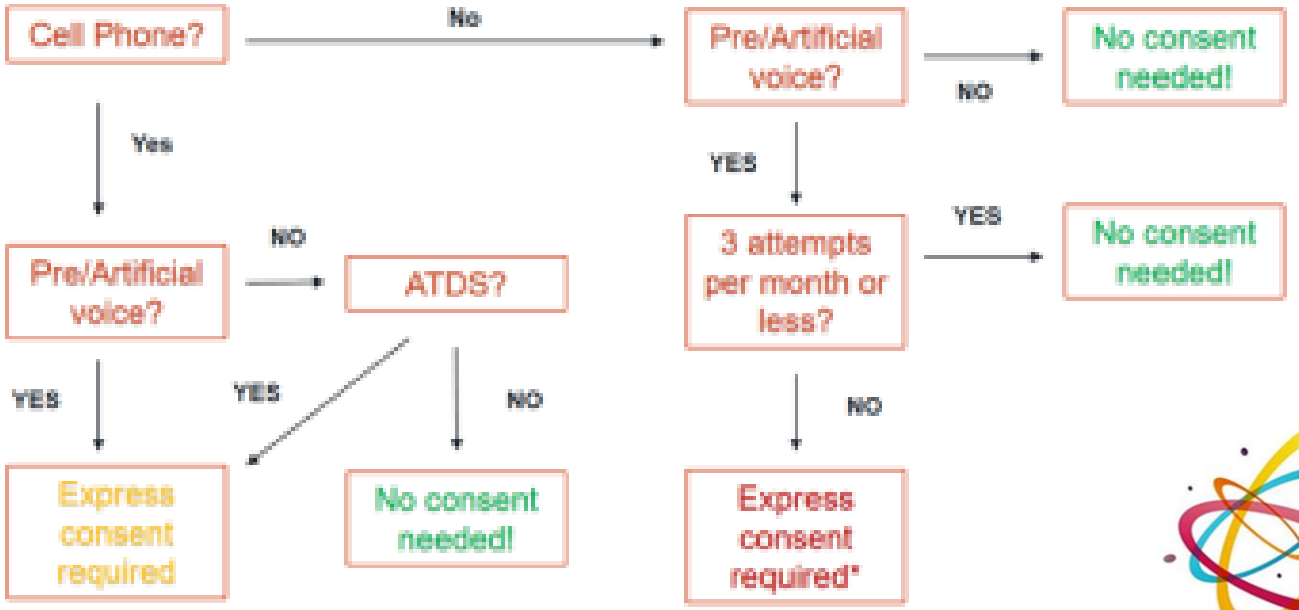

THE GREAT VEGAS COMPLIANCE PALOOZA
LAS VEGAS 2021

July 22nd & 23rd in Las Vegas, NV

FLOWCHART—MARKETING CALLING

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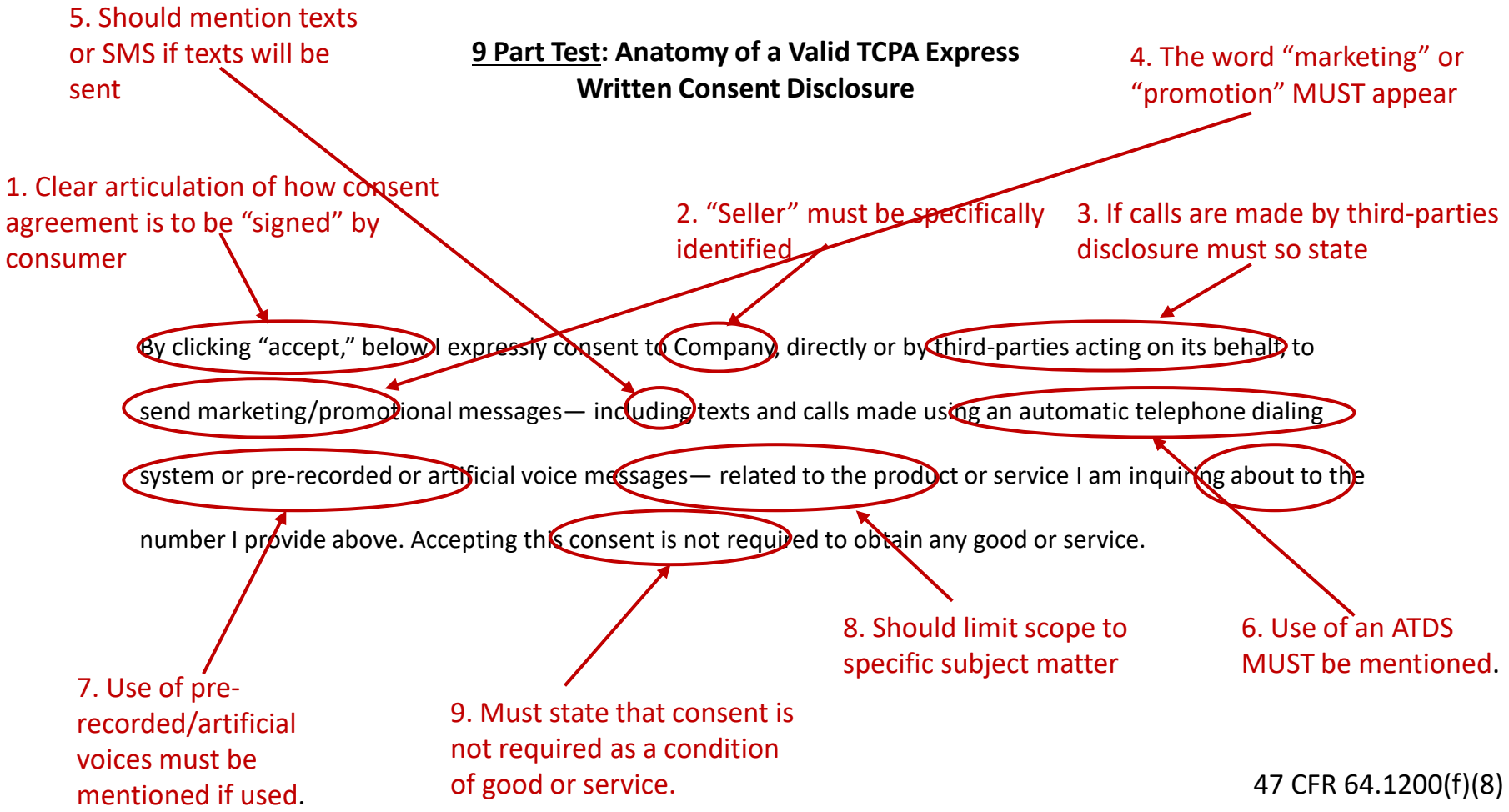
<u>9 Part Test</u>: Anatomy of a Valid TCPA Express Written Consent Disclosure



47 CFR 64.1200(f)(8)

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Huge 2020 Case Law Trend: Courts Refusing to Enforce Online Disclosures

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- Numerous cases refused to enforce online disclosures in 2020.
- Courts are applying a holistic approach with an emphasis on whether a consumer is truly likely to understand they are accepting terms and conditions when submitting a web form.
- General things to keep in mind:
  - **Disclosure must be close to the acceptance button—while "above the button" is not necessarily required it is preferred;**
  - **Hyperlinks must be obvious and underlined or capitalized;**
  - **Disclosure must be in readable font—both in terms of size and color against background;**
  - **Website should not be cluttered or otherwise full of impertinent language in different font sizes and colors that might distract from the disclosure;**
  - **Disclosure should actually and clearly explain that by clicking the button the customer will actually be accepting the disclosure;**
  - **Disclosure must be apparent at the time the user clicks the submit button and cannot pop up only before or after the button is presented.**

Deception in Privacy Notices / Inadequate Consent -- UDAPs

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- Technical or factual misstatements about privacy practices could trigger federal or state UDAP (unfair or deceptive acts or practices) violations, and we have seen this with mobile apps

What Not to Do—Czar's Opinion -- "Dark Patterns"

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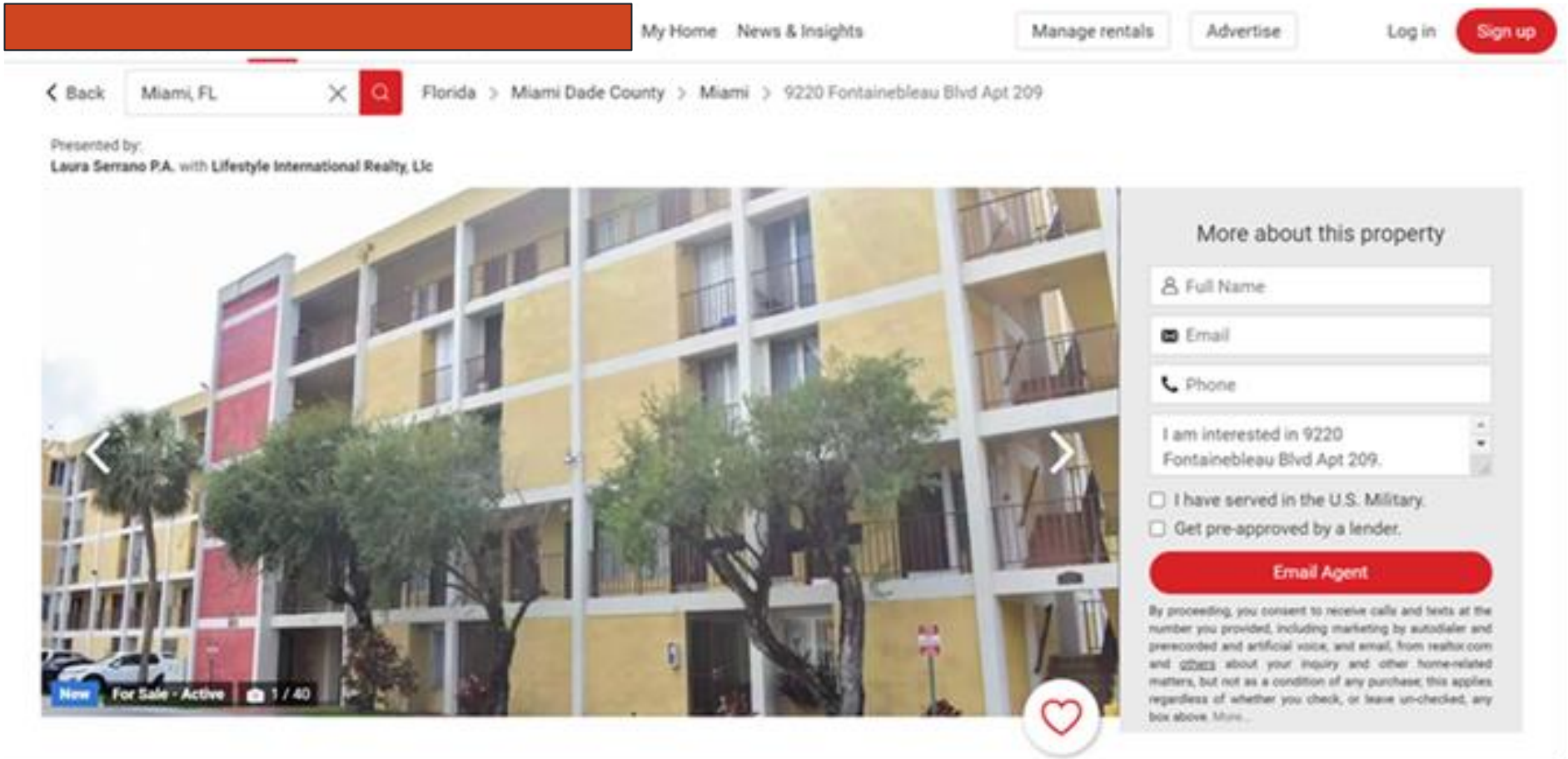

What Not to Do—Czar's Opinion

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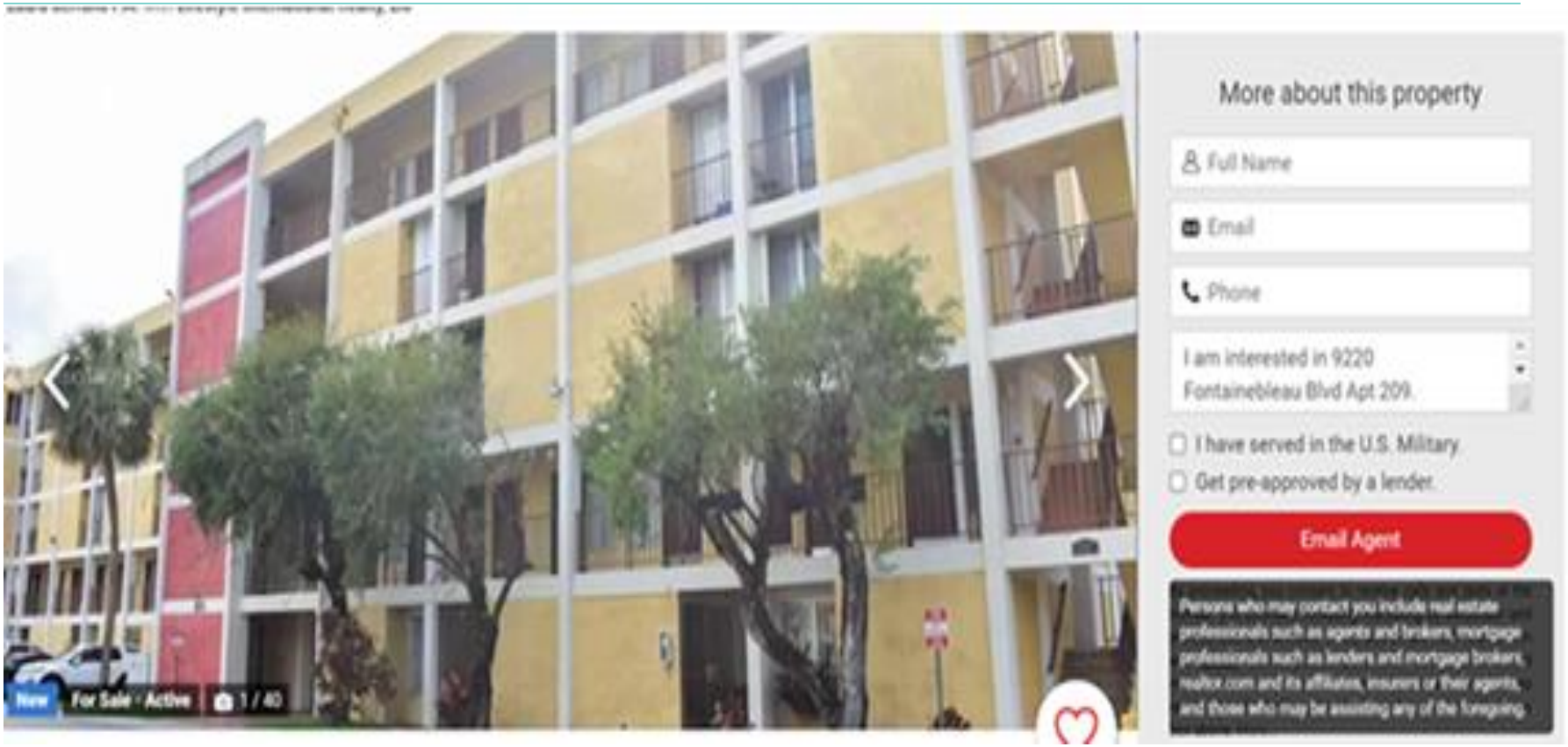
- Consumer prompted to "email agent" for "more about this property." The inserted text says "I am interested in 9220 Fontainbleau." Everything about this layout tells the consumer they are contacting an agent for the specific purpose of obtaining information about a specific property.
- You'll notice that there is a box for "get pre-approved by a lender" which is unchecked. But otherwise there is nothing about the lay out of the page that suggests the consumer will be contacted by a lender when they click "email agent."
- The disclosure says: "By proceeding, you consent to receive calls and texts at the number you provided, including marketing by autodialer and prerecorded and artificial voice, and email, from realtor.com and others about your inquiry and other home-related matters, but not as a condition of any purchase; **this applies regardless of whether you check, or leave un-checked, any box above."**

What Not to Do—Czar's Opinion



In case you can't read it, the "hover" says "person who may contact you include real estate professionals such as agents and brokers, mortgage professionals, such as lenders and mortgage brokers, [website] and its affiliates, insurers, or their agents, and those who may be assisting any of the forgoing."

TRACKING INTERNET SESSIONS CAN LEAD TO TROUBLE

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- Tracking website interactions is critical but may lead to wire tap claims in two-party consent states (California and Florida—private rights of action with large damages).
- These claims may be viable. *Alhadeff v. Experian Info. Sols., Inc.*, No. SACV 21-00395, 2021 U.S. Dist. LEXIS 99655 (C.D. Cal. May 25, 2021) (declining to dismiss Fla. Stat. Ann. § 934.01 claim for use of 'session replay' software to record "mouse clicks and movements, keystrokes, search terms, information inputted by [him], pages and content viewed by [him], scroll movements, and copy and paste actions."
- But can likely be neutralized with good privacy policies. *Javier v. Assur. IQ, LLC*, No. 4:20-cv-02860, 2021 U.S. Dist. LEXIS 48777, at *4 (C.D. Cal. Mar. 9, 2021)
- Similar to old ECPA cookie cases
  - Consent
  - Lack of harm

Don’t Forget CAN-SPAM

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- Messages to mobile domains are opt-in not opt-out
- Providing consideration for a send-to-friend email makes you the sender
  - In need of all the labeling and opt-out for requirement for that message
- Once opted out, use limited to the opt-out
  - No use for custom audience or AD ID
- Although CAN SPAM preempts state email laws generally, they can still regulate fraud and deception

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QUESTIONS?