March 8, 2019

The Honorable Xavier Becerra
Attorney General, State of California
1300 I Street
Sacramento, CA 95814

Dear Attorney General Becerra,

We are writing to follow up on our original comments submitted to your office on 12/26/2018 and the public comment made on 2/5/2019 at the Sacramento public forum. Deputy Attorney General Lisa Kim requested we write in to outline why our concerns are not addressed by 1798.145 in the California Consumer Privacy Act (CCPA).

Section 1798.145 of the CCPA states that “the obligations imposed on businesses by this title shall not restrict a business’s ability to comply with federal, state, or local laws.” Section 1798.145 does not address the contractual relationship, restrictions, and requirements in a service provider arrangement. The CCPA fails to consider the relationship involving a vendor servicing a contract to a school, state, or local government. It is unclear if this relationship would fall within the CCPA’s definition of “service provider” or if it is outside of the scope of the law. State and federal laws such as California’s Student Online Personal Information Protection Act (SOPIPA) and the federal Family Educational Rights and Privacy Act (FERPA) already heavily regulate the use of educational technology companies. There is a strong potential for confusion and conflict with contracts established between an educational technology vendor and the school or state/local government agencies, as well as the legitimate educational interests and the direct control that schools and state/local government agencies are to have over student records by law. A vendor deleting data or responding to an information or access request under the CCPA could violate contractual obligations imposed on a business that is collecting and processing personal information under the direction and control of a school, state/local governmental agency or other entity in strict compliance with existing laws. The school has certain statutory duties to maintain data. That is why deletion requests should be handled through and by the school, as provided by SOPIPA. And the school may have a legitimate interest in having an educator handle a request for access to education records instead of a vendor because it would be helpful to provide additional details and explanation by an educator that a vendor may not be able to provide.

Section 1798.185 authorizes the Attorney General to establish “any exceptions necessary to comply with state or federal law, including, but not limited to, those relating to trade secrets and intellectual property rights...” The clear conflict between CCPA and the student privacy
framework established by laws like SOPIPA, AB 1584, and FERPA would warrant an exception. If a company is subject to and in compliance with SOPIPA, AB 1584, or FERPA, the company should be exempt from compliance with CCPA. To be clear, the educational technology industry is not asking for exceptions when there is a direct relationship between the business and the consumer. In that instance, the company would need to follow the requirements of the CCPA.

We are also concerned about having to provide a copy of responses to test questions and related information under the CCPA and believe that an exception is needed to protect trade secret and copyrights in tests and the integrity of academic, certification, and licensure testing programs (including those which may be established pursuant to law). Having to provide information about, and a copy of, test responses by an individual could provide clues about the content of a test and compromise the utility, value, integrity, and validity of the test. It raises the prospect of giving an unfair advantage for some test takers who are able to receive information about the test and jeopardizing legitimate use of test results as measures of knowledge, skills, competence, or academic achievement. Release of information that provides clues about test questions could necessitate developing new test questions, which is a lengthy and costly process.

SIIA included suggested alternative statutory language in the original comment letter – and we suggest including an exception in order to protect intellectual property and trade secret rights and the security and integrity of tests consistent with AB1584 (Buchanan). We also note that there is an express GDPR exception under the UK Data Protection Act (2018) for test responses.

Please do not hesitate to contact Sara Kloek at skloek@siia.net if we may be of assistance.

Sincerely,

Jeff Joseph
President & CEO
Software and Information Industry Association