

## New Calif. Privacy Board Poised To Balance Various Interests

By **Allison Grande**

*Law360 (March 19, 2021, 10:15 PM EDT)* -- The Squire Patton Boggs LLP attorney and four others selected to helm the inaugural California Privacy Protection Agency are expected to leverage their broad experience across industry, advocacy and academia to strike a measured approach to crafting rules and enforcing cutting-edge digital privacy issues.

The new administrative agency, whose creation was mandated by the California Privacy Rights Act ballot initiative approved by voters last year, will be the first authority in the U.S. solely focused on data privacy.

But while the agency will almost certainly have a strong consumer orientation, the selection of some members who have experience working with companies signals that the board will likely take into account both consumers' and businesses' perspectives in writing regulations and enforcing the law, experts say.

"When you look at these five, there's somewhat of a balance," said Cynthia Cole, a Baker Botts LLP partner. "There doesn't appear to be anything that really screams hyper-consumer protection or hyper-pro-business with any of them, which is ultimately a good thing, because this agency has a broad consumer privacy mandate, so you want the board members to have a broad knowledge and experience base as well."

California's governor, attorney general, Senate president pro tempore and Assembly speaker on March 17 announced their picks for the highly anticipated board: University of California, Berkeley School of Law professor Jennifer M. Urban, who has been tapped to lead the board; Squire Patton Boggs data privacy attorney Lydia de la Torre; former Southern California Edison executive and congressional aide John Christopher Thompson; the California attorney general's public rights division leader Angela Sierra; and Greenlining Institute technology equity attorney Vinhcent Le.

The professional and demographic diversity of the board members stood out to BigLaw attorneys who advise companies on privacy compliance.

"The board is pretty diverse in terms of its experiences and perspectives, which suggests that they will take a holistic approach to privacy issues," said Kirk Nahra, co-chair of the privacy and cybersecurity group at WilmerHale.

The appointees, who are all lawyers, bring with them a wealth of experience in consumer advocacy, whether through working with regulators or focusing on issues such as content moderation and improving broadband access. But the business perspective isn't lacking either, with de la Torre and Thompson in particular having held positions that have required them to collaborate with businesses on data privacy issues.

"It's a good mix to the extent that businesses can feel assured that there will be at least some understanding of the risk and complexities that businesses face with some of these regulations," said Jacqueline Cooney, a senior director of privacy and cybersecurity at Paul Hastings LLP.

The California Privacy Protection Agency will be charged with enforcing the California Consumer Privacy Act, which took effect last year and is the first U.S. law to give consumers more access to and control over the personal data that businesses hold about them, as well as the beefed-up regulations in the California Privacy Rights Act, which will go live in 2023. The state's attorney general will be allowed to bring enforcement actions under both laws.

The new agency is also poised to take over from the attorney general putting forth regulations interpreting both the CCPA and CPRA, which enhances the existing law by giving consumers the right to limit the use and disclosure of a new category of "sensitive" personal information, to opt out of both the sale and sharing of their data, and to correct inaccurate data. The CPRA allows the agency to assume this authority as early as July 1, 2021, or six months after the regulator indicates it is ready to begin rulemaking, and these regulations must be finalized by July 1, 2022.

These new regulations will cover "broader ground" than the existing attorney general regulations implementing the CCPA, noted Lindsey Tonsager, vice chair of the data privacy and cybersecurity practice at Covington & Burling LLP.

"For example, the new regulations will address opt-outs for cross-context behavioral advertising, opt-outs and access rights for automated decision-making technologies, restrictions on the use of so-called dark patterns, and processes for exercising and responding to new consumer rights," Tonsager said.

As the board members look to leverage their credentials in privacy law, policy and technology to draft these new rules, they will almost certainly be faced with feedback from a wide variety of stakeholders, including companies and trade groups across the tech, retail, advertising and other industries; consumer advocates; and federal and state policymakers. The board's varying backgrounds and perspectives will prove beneficial in handling this input, attorneys say.

"Diversity enhances decision-making and the ability to consider issues," said Dominique Shelton Leipzig, co-chair of the ad tech privacy and data management practice at Perkins Coie LLP.

"When it comes to consumer privacy law, you can't have a solution that works for businesses and not the community, and you can't have a system that works for the community but not business," Leipzig added. "We need all stakeholders at the table, and it looks like [California leaders] tried to do that with this cross-section of members and in putting together a highly diverse board that is also a reflection of what California looks like."

Attorneys will also be paying close attention to the enforcement approach and priorities of the new agency, which will have more staff and dedicated resources to put toward addressing consumer complaints and seeking out privacy violations than the California attorney general's office did.

"Companies should be aware that this new board will be singularly focused on privacy in a way that no California regulatory body has been in the past," said Reece Hirsch, co-head of the privacy and cybersecurity practice at Morgan Lewis & Bockius LLP. "That is likely to lead to more robust privacy regulation and enforcement in the wake of the CPRA."

While it remains to be seen which consumer privacy issues the new agency will choose to focus on, the CPRA places particular emphasis on opaque advertising practices, privacy violations involving minors and data security breaches involving sensitive information, WilmerHale's Nahra noted.

Aside from these issues, the members' own experience working on civil rights, algorithmic bias and other emerging public policy topics is also likely to influence the agency's regulatory approach, attorneys say.

"These board members aren't political appointees who have no experience or knowledge about these issues," said Cooney, the Paul Hastings attorney. "They've all spent their careers thinking about these issues."

Urban, who will chair the board, has worked as professor of law and director of policy initiatives for the Samuelson Law, Technology and Public Policy Clinic at the University of California, Berkeley School of Law since 2009. During her career, she's focused on a range of technology and intellectual property issues, including copyright and free expression, biometrics, government surveillance and cybersecurity.

De la Torre, who will be departing Squire Patton Boggs to serve on the board and has also taught at Santa Clara University School of Law, specializes in the intersection of the CPRA and the European Union's General Data Protection Regulation, which took effect in May 2018 and similarly places restrictions on the use and flow of consumer data. The CPRA moves California closer to the GDPR regime, and some have suggested its enactment might make the EU more open to granting the Golden State the data protection adequacy status that has long eluded the U.S. as a whole.

"Her expertise will bring a unique knowledge to the CPPA Board and to California in its examination of these international issues at the state level," the California leaders said in announcing that de la Torre had been designated by Senate President pro Tempore Toni G. Atkins to serve on the board.

The board members also have significant public policy and community outreach experience. Thompson served as senior vice president of government relations on the organizing committee for the upcoming Los Angeles Olympic Games, and Sierra worked on a range of cybersecurity, advertising, civil rights and consumer protection matters during her 33-year career at the California Department of Justice, including a sprawling multistate settlement over the massive Equifax data breach that she handled in her role overseeing the consumer protection section's Privacy Unit.

"The fact that Sierra worked in the California DOJ's office for a long time and oversaw the Privacy Unit for part of that time indicates that she may share the same priorities as that office in terms of privacy enforcement," Nahra said. "This means, for example, that health data and children's data could be areas of priority, particularly for this member."

Le has focused heavily on consumer protection matters aimed at closing the digital divide in the state, including helping to secure funding to increase broadband access and creating a program to provide laptops to low-income students in California through his work at the nonprofit Greenlining Institute.

With these members now appointed to the board, "this agency has a once-in-a-lifetime opportunity to set the stage for the new ground rules for how we're going to deal with our digital society," said Leipzig, the Perkins Coie partner.

"What the responsibilities for the community and for businesses in this digital society should be and where regulators and legislatures should step in are really important but tough questions that don't have simple answers," Leipzig added. "People want to get this right, so hopefully this new agency will follow in the footsteps of data protection authorities in the EU and be available as a sounding board for companies to ask questions and get feedback on these issues."

--Editing by Alanna Weissman and Emily Kokoll.