

California Passes Expansive Consumer Privacy Law

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Data Privacy and Cybersecurity

On June 28, 2018, the Governor of California signed the [California Consumer Privacy Act of 2018](#) (“CCPA”). The new law is the most comprehensive data privacy statute in the United States and introduces significant privacy requirements for covered businesses. The CCPA takes effect on January 1, 2020, but based on comments from both the public-interest and business communities, we fully expect that the legislation will be amended before it becomes operative.

The CCPA quickly passed the state legislature to head off a more stringent ballot initiative that would have imposed additional requirements on covered businesses. Unlike state ballot measures, which are not subject to the standard legislative process, the current CCPA can still be amended by legislators based on comments from the public and other stakeholders.

In this alert, we summarize key aspects of the CCPA and identify initial steps businesses may consider taking in preparation for the new law.

Key Aspects of the California Consumer Privacy Act of 2018

The CCPA requires covered businesses to comply with requirements that grant consumers the right to know what information is being collected from them and whether such information is sold or disclosed to third parties. Notably, the statute allows consumers to access, delete, and prevent the sale of personal information that has been collected by businesses in certain circumstances.

The act applies to for-profit entities doing business in California that collect personal information and meet one of the following tests: have annual gross revenues exceeding \$25 million; annually buy, sell, receive, or share for commercial purposes the personal information of 50,000 or more consumers, households, or devices; or derive 50 percent or more of their annual revenue from selling personal information. Sec. 1798.140(c). Given the CCPA’s broad definition of a business, many businesses of varying size, both inside and outside of California, will likely be required to comply with the law.

The CCPA broadly defines a consumer and goes beyond existing state law in defining personal information. Although a consumer is commonly described as a buyer of a good or service, the new law defines a consumer as a “natural person who is a California resident. . .” Sec. 1798.140(g). Personal information is defined as “information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.” Notable identifiers include, among other things, data from

internet or network activity, such as browsing and search history; data from a consumer's interaction with a website, application, or advertisement; biometric and geolocation data; and any inferences that can be drawn from such information. Sec. 1798.140(o).

Key provisions of the new law include:

- **Data Access Requests**: Upon verifiable request from a consumer, a business must disclose the categories and specific pieces of personal information the business has collected; the categories of sources from which the personal information was collected; the business or commercial purposes for collecting or selling personal information; and the categories of third parties with whom the business shares personal information. Sec. 1798.100-.110. Businesses must respond to a verifiable request within 45 days (the response time can be extended by 45 or 90 days) and the disclosure must cover the 12 months preceding a request. Additionally, businesses must deliver the disclosure free of charge through the consumer's account with the business, if available. If the consumer does not maintain an account with the business, the disclosure can be delivered by mail or electronically. If provided electronically, the copy of the data must be "portable" and, if technically feasible, in a "readily useable format" that allows the consumer to transmit this information to another entity. Sec. 1798.130(a)(2).
- **Data Deletion Requests**: Upon verifiable request from a consumer, a business must delete any personal information about the consumer that it collected from the consumer and direct service providers to do the same. Sec. 1798.105. Exceptions exist, however, allowing businesses and service providers to retain a consumer's personal information under certain circumstances. These exceptions include, for example, completing the transaction or providing other goods or services requested by the consumer; engaging in activities reasonably anticipated within the context of an ongoing business relationship with the consumer; protecting against fraud or other illegal activity; exercising free speech; complying with law; and enabling internal uses that are reasonably aligned with consumer expectations. Sec. 1798.105(d).
- **Opt Out of the Sale of Personal Information**: Consumers have the right to opt out of the sale of their personal information by a business, and businesses that sell consumers' personal information must notify consumers that they have the right to opt out of the sale of their personal information. Sec. 1798.120. "Sale" is defined as "the selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating . . . a consumer's personal information by the business to another business or a third party *for monetary or other valuable consideration.*" Sec. 1798.140(t)(1). This definition is narrower than the alternative in the ballot initiative.
- **Consent For Minors**: Businesses are prohibited from selling the personal information of a consumer below the age of 16. However, minors 13 to 16 years old can "affirmatively authorize" the sale of their personal information. Consent of a parent or guardian is required for a business to sell the personal information of children under the age of 13. Sec. 1798.120(d).
- **Prohibitions Against Discrimination & Financial Incentives**: The CCPA explicitly prohibits businesses from discriminating against consumers that request to access, delete, or opt out of the sale of their personal information. If a consumer exercises their rights under the CCPA, businesses are prohibited from, among other things, charging a consumer a different price or providing a different quality of goods or services, except if the difference is reasonably related to value provided by the consumer's data.

Businesses are permitted, however, to offer financial incentives for the collection of personal information, subject to certain conditions. Sec. 1798.125.

- **Privacy Policy Disclosures**: Businesses will need to provide additional notice to California consumers about their rights pursuant to the CCPA, typically through online privacy policies. The notice must include a description of one or more methods through which consumers can submit requests to a business; a list of categories of personal information that a business has collected about consumers in the preceding 12 months; and a list of the categories of personal information a business has sold or disclosed for business purposes to a third party in the preceding 12 months or a statement that personal information has not been sold or disclosed for business purposes. In addition, a new link must be added to Internet homepages titled “Do Not Sell My Personal Information.” This link must enable the consumer to opt out of the sale of the consumer's personal information. Sec. 1798.130(a)(5).
- **Enforcement & Private Right of Action for Certain Data Breaches**: The CCPA is enforceable by the California Attorney General. Any person, business, or service provider found in violation may be liable for a civil penalty of up to \$7,500 per incident. Under certain circumstances, consumers, in coordination with the Attorney General, are authorized to sue for damages relating to a breach of a certain subset of violations. Specifically, a consumer can file suit if any of their unencrypted or non-redacted personal information is accessed and exfiltrated, stolen, or disclosed without authorization, and the breach was the result of the business failing to implement and maintain reasonable security procedures or practices appropriate to the nature of the information. Before filing a claim, a consumer is required to give the business 30 days' written notice and the business has 30 days to cure. If the business provides the consumer a written statement that the violation has been cured and that no further violations shall occur, no suit can be filed against the business. A consumer must also notify the Attorney General within 30 days that an action has been filed. The Attorney General, in turn, has 30 days to determine whether to intervene and prosecute on behalf of the consumer, allow the consumer's action to proceed, or determine that the suit is frivolous and bar the action from proceeding. Sec. 1798.150.
- **Attorney General Authorities**: The CCPA does not take effect until 2020, but in the interim, the California Attorney General is authorized to enact a number of regulations implementing the statute. The act requires the Attorney General to solicit public feedback on or before January 1, 2020 for any additional regulations implementing the new law. Specifically, the Attorney General is empowered to establish rules relating to the standard for verifiable consumer requests, business compliance with consumer opt out requests, notice requirements, financial incentive offerings, and other rules as needed to effectuate the CCPA. Sec. 1798.185.

Initial Business Considerations

Although the California legislature is expected to further revise the CCPA before it takes effect in 2020, businesses may consider taking some initial steps to prepare for the new law.

Covered businesses should assess whether existing practices involving the collection, use, or sharing of data implicates the personal information identifiers defined in the act. If so, it might be prudent to consider changes, such as minimizing the collection of certain personal identifiers where practicable, modifying third party contracts involving the sale or sharing of personal

information, and adjusting data privacy policies and procedures to comply with the CCPA. Companies in highly regulated industries that already are subject to sector-specific federal privacy laws will want to consider the potential availability of exemptions under the CCPA. For example, the CCPA does not apply to personal information that is collected, processed, sold, or disclosed by a financial institution pursuant to the Gramm-Leach-Bliley Act (“GLBA”) if the CCPA is in conflict with the GLBA.

Additionally, with personal information increasingly employed to optimize products and services, covered businesses across industries, particularly those utilizing data monitoring and analytic tools, should anticipate the need to allocate resources and prepare for increased operating costs associated with, among other things, optimizing data retention policies, training personnel, enabling consumers to submit requests to access, delete, or opt out of the sale of their personal information, updating consumer notice practices, and other organizational and infrastructure changes.

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We are continuing to engage on developments relating to this statute, and are well-positioned to assist clients in understanding how this recent announcement may affect their business operations or in providing feedback to the California legislature on possible amendments, the California Attorney General on interpretive clarifications and rules, and other legislative efforts at the state and federal levels.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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