

## Practice Update

# California AG Releases Long-Awaited Proposed Regulations Under the CCPA

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Since the California Consumer Privacy Act (CCPA) was enacted in June 2018, businesses have been waiting for the [proposed regulations](#) to provide guidance and potential clarifications. On October 10, 2019, California Attorney General Xavier Becerra released proposed regulations regarding the CCPA. While the proposed regulations offer clarity regarding some provisions in the CCPA, they also seek to impose additional requirements which may cause businesses that have begun compliance efforts to revisit their planned policies, procedures, and notices.

## Overview of the CCPA

The CCPA grants consumers rights regarding access to, deletion of, and sharing of personal information that businesses collect about them. The CCPA applies to any for-profit business or legal entity that receives consumers' personal information and meets at least one of the following thresholds:

- Has annual gross revenues of more than \$25 million; or
- Buys, receives, or sells the personal information of at least 50,000 California consumers, households, or devices; or
- Receives at least 50% of its annual revenues from selling consumers' personal information.

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The CCPA contains a number of consumer rights related to their personal information including:

- The right to know what personal information a business collects about them, the sources from which personal information is collected, whether the business sells personal information, and why the business collects such information;
- The right to request deletion of personal information that a business collected about the consumer;
- The right to opt out of a business's sale of their personal information; and
- The right to not have a business discriminate against them because they exercised any of their rights under the CCPA.

The limited exceptions to the applicability of the CCPA include information that is already governed by other data privacy laws such as the Health Insurance Portability and Accountability Act (HIPAA), the Health Information Technology for Economic and Clinical Health Act (HITECH), the Gramm-Leach-Bliley Act, the California Confidentiality of Medical Information Act, or the California Financial Information Privacy Act.

The CCPA provides for a private right of action by consumers in certain data breach circumstances: if “non-encrypted or non-redacted” consumer information is compromised due to a lack of reasonable security, a consumer may sue for actual damages or statutory damages, whichever is greater. Other issues of CCPA non-compliance may be enforced by the California Attorney General. The Attorney General is permitted to begin enforcement actions no later than July 1, 2020 or, if earlier, six months after the final regulations are issued.

### **The Proposed Regulations**

The proposed regulations provide further detail concerning a number of requirements in the law and

impose additional requirements that were not included in the CCPA. According to the Attorney General, the proposed regulations will make it easier for consumers to exercise their rights under the CCPA by providing “clear direction” to businesses on how to notify consumers of their rights and how to handle consumer requests. For example, in addition to acting on the request, the proposed regulations require businesses to confirm that they received certain consumer requests within a prescribed timeframe.

The following provides a high-level overview of select regulatory provisions; it is not intended to be a comprehensive list of the CCPA’s or the proposed regulations’ requirements, but may serve as useful guide to certain “highlights” of the proposed regulations.

- **Notices.** In general, the notices required by the CCPA must be: in plain language; in a format that draws the consumer’s attention; available in the languages in which the business provides contracts, disclaimers, and other information to consumers in the ordinary course; and accessible to consumers with disabilities.
- **Notice at Collection.** Under the CCPA, a business that collects personal information must inform consumers at or before the point of collection as to categories of personal information to be collected and the purposes for which the categories of personal information shall be used. The proposed regulations expand on this by requiring the notice to include a list of the categories of personal information to be collected. Each category must be described in a way that provides consumers a meaningful understanding of the information being collected. For each category of personal information, the notice must state the business or commercial purpose for which it will be used. Also, the proposed regulations require that this notice be visible or accessible where consumers will see it before any personal information is collected.

- The proposed regulations clarify that a business that does not collect information directly from consumers is not required to provide notice at the point of collection to the consumers, but, before selling any consumer's personal information, the business must do one of the following:
  - Contact the consumer directly and provide the consumer with a notice of right to opt-out of the sale; or
  - Contact the source of the consumer's information to confirm that the source provided the required notice to the consumer and obtain signed attestation from the source describing how the notice was provided and including a sample of the notice.
- **Notice of Right to Opt-Out of Sale.** If a business sells consumers' personal information, it must provide consumers with notice that they have the right to opt-out of the sale and inform them how to exercise that right.
  - Business must place a "Do Not Sell My Personal Information" or "Do Not Sell My Info" link on their website homepage or mobile application landing page. When consumers click on the link, they must be directed to a notice that describes the consumer's right to opt-out, how the consumer can opt-out, any proof required when a consumer uses an authorized agent to opt-out, and a link or URL to the business's privacy policy.
  - In addition, a business that "substantially interacts" with consumers offline must also provide notice of the right to opt-out by "an offline method that facilitates consumer awareness of their right to opt-out" such as, for example, posting signage or printing the notice on a paper form used to collect personal information.
- **Financial Incentives and Non-Discrimination.** A financial incentive, price difference, or service difference (collectively "Financial Incentives") is

discriminatory and prohibited if a business treats a consumer differently because the consumer exercised a right conferred by the CCPA unless the Financial Incentive is reasonably related to the value of the consumer's data.

- The proposed regulations require a business that offers a Financial Incentive to “use and document a reasonable and good faith method for calculating the value” and specifically identify several acceptable methods.
- A business that provides Financial Incentives to a consumer based on the value of the consumer's data must provide a notice that includes:
  - A summary of the Financial Incentive including material terms and the categories of personal information implicated by the Financial Incentive;
  - How the consumer can opt-in to the Financial Incentive and notification of the consumer's right to withdraw consent at any time and how to exercise that right;
  - An explanation of why the Financial Incentive is permitted under the CCPA including a good faith estimate of the value of the consumer's data that forms the basis for the Financial Incentive and a description of the method the business used to calculate the value of the consumer's data.
- **Privacy Policy.** In general, a business's privacy policy must describe consumers' rights under the CCPA and how to exercise those rights.
  - The policy must explain how a consumer can designate an authorized agent to make a request under the CCPA on the consumer's behalf, but the proposed regulations leave it up to the business to decide what the specific process is for designating an authorized agent.
  - The policy must include the date it was last updated and provide a contact for questions or

concerns about the business's privacy policies and practices.

- Further, the proposed regulations require the policy to be available “in an additional format that allows a consumer to print it out as a separate document.” A link to a PDF version of the policy presumably would satisfy this requirement.
- **Submission of Consumer Requests to Know and Requests to Delete.** To accommodate consumers' submissions of requests to know how their personal information has been used and requests to delete their personal information, businesses must provide a minimum of a toll-free telephone number and a website form accessible through a business's website or mobile application.
  - In addition, a business may be required to provide a third means of submitting requests to delete if it primarily interacts with consumers through other methods (such as, for example, a retail location).
  - Businesses must use a two-step process for online requests to delete their information in which the consumer must first submit the request to delete and then separately confirm he or she wants his or her personal information deleted.
  - If a consumer submits a request to know or to delete in a manner that is not one of the business's designated methods, the business must still nonetheless either treat the request as if it was submitted through a designated method or provide the consumer with directions on how to properly submit the request.
- **Responding to Consumer Requests to Know and Requests to Delete.** The CCPA requires businesses to respond to consumers' requests to know and requests to delete within certain timeframes.



- The proposed regulations impose a new requirement that a business confirm within 10 days of receipt of a request to know or request to delete and provide information to the consumer about how the business will process the request. This may trigger businesses to adjust their planned procedures for handling such requests.
- The proposed regulations address an apparent conflict in the CCPA regarding the time a business has to respond to requests to know and requests to delete. A business must respond within 45 days of receipt to requests to know and requests to delete and, if necessary, a business may take up to an additional 45 days, for a maximum of 90 days from the date a request is received. The business must provide the consumer with notice and explanation for the additional time needed to respond.
- Before disclosing any categories of information or specific pieces of information about the consumer pursuant to a request to know, a business must verify the identity of the person making the request.
  - If the requestor's identity cannot be verified, the business may not disclose any personal information or categories of information to the requestor and must inform the requestor that his/her identity could not be verified.
  - Regardless of whether a requestor's identity can be verified, the business must not at any time disclose a consumer's Social Security number, driver's license number or other government-issued identification number, financial account number, any health insurance or medical information, account passwords, or security questions and answers.
- In response to a consumer's request to know categories of information and/or sources, a business must provide an individualized response to the consumer and may not refer

the consumer to the business's privacy policy unless the business's response would be the same for all consumers and the privacy policy discloses all the information required to be included in the response.

- The proposed regulations provide that the 12-month period covered by a consumer's request to know runs from the date the business received the request. Based on this language, if a business receives a consumer's request on, for example, January 1, 2020, the business apparently would be required to provide the consumer with the requisite information concerning his or her personal data going back to January 1, 2019.
- A business may comply with a consumer's request to delete his/her personal information by: permanently and completely deleting the personal information on existing system; de-identifying the personal information; or aggregating the personal information. A business may delay deletion of personal information on archive or back-up systems until the archive or back-up is next accessed or used.
- In response to the consumer's request to delete, the business must specify the manner in which it complied with the consumer's request.
- **Consumer Requests to Opt-Out.** A business must provide consumers with at least two methods of submitting requests to opt-out of the sale of their personal information.
  - One of these methods must be an interactive website form accessible via a conspicuous link titled "Do Not Sell My Personal Information" or "Do Not Sell My Info" on the business's website and/or mobile application.
    - Other acceptable methods include a toll-free telephone number, a designated email address, a form submitted through the mail,



or a browser plug-in or privacy setting that communicates a consumer's choice to opt-out.

- At least one of the methods of opting-out must reflect the manner in which the business primarily interacts with the consumer.
- The proposed regulations go further than the CCPA in requiring a business that collects personal information from consumers online to treat user-enabled privacy controls, such as a browser plug-in or privacy mechanism that communicates a consumer's choice to opt-out, as a valid request pursuant to the CCPA.
- A business must act on the request as soon as feasible, but no later than 15 days from the date the business receives the request. This time requirement is not in the CCPA.
- Unlike a request to know or to delete, a request to opt-out does not require verification. However, if a business has a reasonable belief that an opt-out request is fraudulent, then the business may document the reason for its belief and inform the requesting party why the request is believed to be fraudulent.
- **Verification of Consumers' Requests.** A business must establish, document, and comply with a reasonable method for verifying that the person making a request to know or a request to delete is the consumer about whom the business collected the information.
  - Whenever feasible, a business should match the identifying information provided by the consumer to the personal information of the consumer already maintained by the business, or use a third-party verification service to comply.
  - A business is permitted to request additional information from the consumer only if the business is not able to verify the identity of the person making the request. The business may

not use any information obtained for verification purposes for any other purpose.

- If a consumer has a password-protected account with a business, the business may verify the consumer's identity through the business's existing authentication practices for the consumer's account; the business must require the consumer to re-authenticate before disclosing or deleting the consumer's data.
- If a consumer does not have a password-protected account, a business may verify the identity of the consumer making the request by:
  - For a request to know categories: matching at least two data points provided by the consumer with data points maintained by the business, which the business has determined to be reliable for the purpose of verifying the consumer.
  - For a request to know specific pieces of information: matching at least three pieces of personal information provided by the consumer with personal information maintained by the business, which the business has determined to be reliable for the purpose of verifying the consumer, and obtaining a signed declaration under penalty of perjury that the requestor is the consumer whose personal information is the subject of the request.
- **Children and Minors.** The CCPA and the proposed regulations provide heightened protections for children's personal information.
  - A business may not sell the personal information of children under 13 years of age without the opt-in consent by the child's parent/legal guardian using a reliable method of consent, examples of which are provided in the proposed regulations.
  - A business that knows it collects or maintains the personal information of minors aged 13 to

16 may not sell such information unless the minor opts-in to the sale of his/her personal information through an established, documented, reasonable process. Notice must be provided to the minor that he or she may opt-out at any time and the process for doing so.

- **Training and Recordkeeping.** The proposed regulations also expand on the CCPA's provisions concerning training of personnel who handle consumer privacy inquiries and associated recordkeeping requirements.
  - Individuals responsible for handling consumer inquiries and requests about privacy practices must be informed about the CCPA's requirements and how to direct consumers to exercise their rights.
  - A business must maintain consumer requests and responses to them for at least 24 months.
  - Businesses that annually buy, sell, share for commercial purposes, or receive for commercial purposes the personal information of 4 million or more consumers are subject to additional metrics-compilation and disclosure requirements.

The proposed regulations are subject to a public comment period through 5:00 p.m. PST, December 6, 2019. The Attorney General will also be holding four public hearings in early December to solicit additional comments. Given the timing of the public comment period, it is unlikely that the regulations will be finalized until at least early 2020, at which point the CCPA will already be in effect. To further complicate compliance efforts, the Attorney General will likely issue additional proposed regulations for the newly-approved amendments to the CCPA.

Businesses that have begun their CCPA compliance preparations should revisit their processes and procedures to confirm they comply with the proposed regulations, which add some new

requirements, as outlined above. In announcing the proposed regulations, Attorney General Becerra indicated that he does not view the gap in time between the CCPA's January 1 effective date and the date on which he is empowered to enforce the CCPA as any type of a safe harbor for non-compliance. Therefore, it will be important to have adequate training, procedures, and infrastructure in place prior to January 1, 2020 to ensure compliance.

One last point worth noting: In addition to the Attorney General's proposed CCPA regulations, on October 11, 2019, Governor Gavin Newsom signed six new bills into law that make certain amendments to the CCPA including: temporarily excluding certain employment-related information from the definition of personal information (this provision has an automatic sunset date of January 1, 2021); exempting vehicle and ownership data for the purpose of fulfilling vehicle warranties or recalls; and requiring data broker businesses to register with the Attorney General on or before January 31 following each year in which the business meets the definition of a data broker. These amendments are not addressed in the proposed regulations and are slated to be the subject of future rulemaking.

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