

The California Consumer Privacy Act of 2018 Updated: More Protection in the Quest to Access and Protect Personal Information

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INTRODUCTION

After California hastily enacted the California Consumer Privacy Act of 2018,¹ and the governor signed cleanup legislation in September 2018,² Californians gained new privacy rights and protections.³ The Legislature, with time to consider its actions, amended the CCPA in 2019,⁴ and passed additional bills in 2020.⁵ The California Attorney General's Office, pursuant to Civil Code section 1798.185, issued final regulations interpreting the CCPA,⁶ and began enforcing it on July 1, 2020.⁷ Finally, the protagonist who conceived of the CCPA, Alastair Mactaggart, filed a ballot initiative, the California Privacy Rights Act of 2020, that was approved by California voters on November 3, 2020, as Proposition 24.⁸

This survey summarizes the developments since the enactment of the CCPA, including the Legislature's amendments to the Act, the Attorney General's regu-

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1. See CAL. CIV. CODE §§ 1798.100–199 (West 2020); A.B. 375, 2017–2018 Reg. Sess. (Cal. 2018) (approved by the Governor June 28, 2018; filed with the Secretary of State June 28, 2018; adding Title 1.81.5 to the California Civil Code, effective Jan. 1, 2020), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB375 [hereinafter CCPA].

2. See S.B. 1121, 2017–2018 Reg. Sess. (Cal. 2018).

3. See generally Sanford Shatz & Susan E. Chylik, *The California Consumer Privacy Act of 2018: A Sea Change in the Protection of California Consumer's Personal Information*, 75 BUS. LAW. 1917 (2020) (in the 2020 Annual Survey).

4. See *id.* at 1917 n.6.

5. A.B. 713, 2019–2020 Reg. Sess. (Cal. 2020) [hereinafter A.B. 713]; A.B. 1281, 2019–2020 Reg. Sess. (Cal. 2020) [hereinafter A.B. 1281]; S.B. 980, 2019–2020 Reg. Sess. (Cal. 2020) [hereinafter S.B. 980]. If enacted, A.B. 713 would impact deidentified and reaggregated medical information, A.B. 1281 would extend the exemption for employment information through January 1, 2022, and S.B. 980 would create the Genetic Information Privacy Act.

6. See Final Text of Proposed Regulations, CAL. CODE REGS. tit. 11, §§ 999.300–999.337 (2020), <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/oal-sub-final-text-of-reg.pdf?>.

7. See CAL. CIV. CODE § 1798.185(c) (West 2020).

8. *California Privacy Rights Act of 2020*, CAL. SEC'Y ST., <https://vig.cdn.sos.ca.gov/2020/general/pdf/topl.pdf> (last visited Dec. 20, 2020) [hereinafter Proposition 24]; *State Ballot Measures—Statewide Results*, CAL. SEC'Y ST., <https://electionresults.sos.ca.gov/returns/ballot-measures> (last visited Dec. 20, 2020).

lations and initial enforcement efforts, and the ballot initiative. The survey concludes with suggestions for compliance with the CCPA.

THE LEGISLATIVE AMENDMENTS TO THE CCPA

The Legislature made it easier for businesses to comply with the CCPA. Consumers have a right to request from businesses that collect or sell their personal information the categories of personal information collected or sold, the sources from which personal information is collected, the commercial purpose for collecting that information, and the specific pieces of information collected.⁹ Businesses that operate exclusively online, and have a direct relationship with a consumer, will only be required to provide an email address for consumers to submit requests for their information, rather than also providing other means, such as a toll-free telephone number.¹⁰ In addition, the efforts to authenticate a consumer may vary with the information requested.¹¹ For example, the authentication required by a consumer who merely seeks the categories of information requested may be less stringent than for a consumer who seeks the actual information collected.¹² To help further with protecting the consumer's personal information, a business may require a consumer who has an account with the business to submit all information requests through that account.¹³

The Legislature removed from the definition of personal information any consumer information that is deidentified, or is aggregate consumer information.¹⁴ That is, information that is not directly identifiable to a specific consumer and is not that consumer's personal information.

Businesses remain liable to consumers for data breaches.¹⁵ However, that liability is now based on the unauthorized access and exfiltration, theft, or disclosure of "nonencrypted *and* nonredacted" personal information, rather than "nonencrypted *or* nonredacted" personal information.¹⁶ With this change, the Legislature made it more difficult to maintain a claim under the CCPA for a data breach.

Finally, recognizing that the definition of consumer was so broad that it encompassed potential and actual employees, the Legislature amended the CCPA to exclude employment-related information. Personal information collected by a business about a natural person in the course of job applications and employment, or as a contractor, are not included in the definition of "personal information" through January 1, 2022.¹⁷

9. CAL. CIV. CODE §§ 1798.110(a), 1798.115 (West 2020).

10. *Id.* § 1798.130(a)(1)(A).

11. *Id.* § 1798.130(a)(2).

12. *Id.*

13. *Id.*

14. *Id.* § 1798.140(o)(3).

15. *Id.* § 1798.150.

16. *Id.* § 1798.150(a)(1).

17. *Id.* § 1798.145(h). Proposition 24 addresses this issue following the expiration of the statutory deadline.

THE ATTORNEY GENERAL'S FINAL REGULATIONS AND INITIAL ENFORCEMENT EFFORTS

THE FINAL REGULATIONS

The final regulations identify three notices required by the CCPA: (1) notices required of a business that collects personal information; (2) notice of opt-out required of a business that sells personal information; and (3) notices required of a business that offers “a financial incentive or price or service difference.”¹⁸

All businesses that collect personal information from consumers are required to provide a timely notice at the point of collection about the categories of personal information to be collected and an explanation of why the information is being collected.¹⁹ A business may not collect other categories of information outside of the categories described in the notice.²⁰ The notice at collection must include: (1) a list of categories of personal information to be collected; (2) the business or commercial purpose for which the information will be used; (3) if a business sells personal information, a “Do Not Sell My Personal Information” or “Do Not Sell My Info” link; and (4) a link to the business’s privacy policy.²¹

Any business that sells personal information of consumers must send a notice of the right to opt out of the sale, to inform consumers of their right to direct businesses to stop selling their personal information.²² The regulations provide that the right to opt-out notice should include: (1) a description of the consumer’s right to opt out of the sale of their personal information; (2) an interactive form where a consumer can submit their opt-out request online, or an offline method to submit a request if the business does not operate online; and (3) instructions for any other method through which the consumer may submit a request to opt out.²³ The notice of right to opt out should be posted on the webpage of the business where the consumer is directed after clicking the required “Do Not Sell My Personal Information” or “Do Not Sell My Info” link.²⁴

Businesses that offer a “financial incentive or price or service difference related to the collection, retention, or sale of personal information” are required to provide consumers with a notice of financial incentive. The purpose of this notice is to explain the material terms of the incentive so consumers can make an “informed decision” regarding whether to participate in the financial incentive.²⁵

The regulations provide that the notice of financial incentive should include the following information: (1) a summary of the financial incentive or price or

18. CAL. CODE REGS. tit. 11, §§ 999.304, 999.305(a)(2) (2020). All notice types must use “plain, straightforward language and avoid technical or legal jargon” and be in a “format that draws the consumer’s attention to the notice and makes the notice readable.” The regulations specifically require that the notices should also be readable on “smaller screens,” if applicable.

19. *Id.* § 999.305(a)(1).

20. *Id.* § 999.305(a)(5).

21. *Id.* § 999.305(b)(1)–(4).

22. *Id.* § 999.306(a)(1).

23. *Id.* § 999.306(c)(1)–(3).

24. *Id.* § 999.306(b)(1).

25. *Id.* § 999.307(a)(1).

service difference being offered; (2) a description of the material terms of the incentive; (3) how a consumer can opt in to the incentive; (4) a statement that the consumer may withdraw from the financial incentive at any time and how to exercise this right; and (5) an explanation of how the incentive is “reasonably related to the value of the consumer’s data,” which must include a good-faith estimate of the value of the consumer’s data that forms a basis for the incentive and a description of how the business calculated the value of the consumer’s data.²⁶

The final regulations require that all businesses subject to the CCPA provide consumers with a privacy policy.²⁷ The intended purpose of the privacy policy is to provide consumers with a description of a business’s practices, both online and offline, regarding the “collection, use, disclosure, and sale of personal information and of the rights of consumers regarding their personal information.”²⁸ In addition to general presentation requirements regarding plain language, readability, and accessibility to consumers with disabilities, the privacy policy must also be available for consumers to print out as a hard copy.²⁹

If a business operates a website, it must post its privacy policy online through a conspicuous link using the word “privacy” on the business’s website homepage or landing page of a mobile application.³⁰ If a business does not operate a website, it must make its privacy policy “conspicuously available to consumers.”³¹ The final regulations also require privacy policies to inform the consumer of all of the consumer privacy rights under the CCPA and to explain and disclose certain business-specific information regarding those rights.³² The privacy policy must also provide information regarding the business’s authorized agent, contact information, the date that the policy was last updated, and other required information if the business has actual knowledge that it sells personal information of minors under sixteen years of age.³³

Most businesses are required to allow consumers a minimum of two or more designated methods for submitting requests to know the information a business collects about them.³⁴ At a minimum, the regulations provide that a business must provide a consumer a toll-free telephone number, along with a designated email address, a form that may be submitted in person, or a form to submit by mail.³⁵

Similarly, for requests to delete, a business is also required to provide two or more methods for a consumer to submit these requests.³⁶ For requests to delete submitted online, businesses are permitted to use a two-step process where the

26. *Id.* § 999.307(b)(1)–(5).

27. *Id.* § 999.308.

28. *Id.* § 999.308(a)(1).

29. *Id.* § 999.308(a)(2).

30. *Id.* § 999.308(b).

31. *Id.*

32. *Id.* § 999.308(c)(1)–(4).

33. *Id.* § 999.308(c)(5)–(9).

34. *Id.* § 999.312(a), (b).

35. *Id.* § 999.312(a).

36. *Id.* § 999.312(b).

consumer must initially submit the request to delete, and then separately confirm they want their personal information deleted.³⁷

The regulations also provide a robust set of rules for responding to consumer requests to know and requests to delete. As an initial step, businesses must confirm receipt of either request within ten business days.³⁸ The business must then respond to the request within forty-five calendar days of receipt, but may take an additional forty-five days (for a maximum of ninety calendar days) if the business provides the consumer with notice and an explanation of why additional time is needed.³⁹

For requests to know, the regulations provide comprehensive rules for how to respond, what types of information to disclose (or not disclose), the process for denying a request, and when a business is not required to search for personal information.⁴⁰ Similarly, for requests to delete, the regulations specify how a business may respond, including the process for deleting the requested information, and the procedures for denying a request to delete.⁴¹

The regulations also provide that if a business maintains information that is “deidentified,” the business is not required to provide or delete the deidentified information in response to a consumer request.⁴²

The final regulations require a business to provide two or more designated methods for submitting a request to opt out, one of which must be an interactive form accessible through a link titled “Do Not Sell My Personal Information” or “Do Not Sell My Info” on the business’s website or mobile application.⁴³ In addition, a business that collects personal information online must generally treat “user-enabled global privacy controls,” (e.g., a browser plugin) as a valid request.⁴⁴ A business must comply with a request to opt out “as soon as feasibly possible, but no later than 15 business days” of receipt of the request.⁴⁵

When responding to a request to opt out, a business is also permitted to provide the consumer with a choice to opt out of sale for only certain uses of personal information, provided that a “global option” to opt out of the sale of all personal information is more prominently presented.⁴⁶ The regulations also contemplate a scenario where a consumer chooses to opt in to the sale of personal information after opting out, in which case a two-step process must occur where the consumer first requests to opt in and then confirms their choice to opt in.⁴⁷

The CCPA requires that consumer requests to know and requests to delete must be “verifiable consumer requests,” meaning that a business must “establish,

37. *Id.* § 999.312(d).

38. *Id.* § 999.313(a).

39. *Id.* § 999.313(b).

40. *Id.* § 999.313(c).

41. *Id.* § 999.313(d).

42. *Id.* § 999.323(f).

43. *Id.* § 999.315(a).

44. *Id.* § 999.315(c).

45. *Id.* § 999.315(e).

46. *Id.* § 999.315(d).

47. *Id.* § 999.316(a).

document, and comply with a reasonable method for verifying that the person making a request to know or request to delete is the consumer about whom the business has collected information.⁴⁸ Importantly, unlike a request to know and a request to delete, a request to opt out need not be a verifiable consumer request, but a business is permitted to deny a request to opt out with a “good-faith, reasonable, and documented” belief that the request is fraudulent.⁴⁹

When verifying a request to know or request to delete, the final regulations provide that businesses are prohibited from requiring a consumer or a consumer’s agent to pay a fee for the verification of the request.⁵⁰ When feasible, businesses should verify a consumer’s identity by “match[ing] 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.”⁵¹ The regulations also provide factors to consider and weigh when verifying a consumer’s identify, including the type, sensitivity, and value of the personal information.⁵² In addition, depending on the type of request and the information requested, the regulations provide certain rules to follow when a business cannot verify the identity of the person making the request.⁵³

The regulations specify that all persons responsible for handling consumer inquiries about the business’s privacy practices or CCPA compliance must be informed of all requirements under the CCPA (and the regulations) and must understand how to direct consumers to exercise their rights.⁵⁴

INITIAL ENFORCEMENT EFFORTS

On July 1, 2020, the California Attorney General began enforcing the CCPA by sending non-compliance letters to companies, with no particular industry focus, that did not include privacy disclosures and a “Do Not Sell My Personal Information” link on their websites, and were otherwise the targets of consumer complaints.⁵⁵ The companies that received the letters can respond that they do not sell a consumer’s personal information,⁵⁶ that they do not meet the CCPA threshold to be a business,⁵⁷ or that they are otherwise subject to another exemption.⁵⁸ Alternatively, the businesses can cure the violation.⁵⁹

48. CAL. CIV. CODE §§ 1798.105(c), 1798.115(b) (West 2020); CAL. CODE REGS. tit. 11, § 999.323(a) (2020).

49. CAL. CODE REGS. tit. 11, § 999.315(g) (2020).

50. *Id.* § 999.323(d).

51. *Id.* § 999.323(b)(1).

52. *Id.* § 999.323(b).

53. *Id.* § 999.313(c)(1)–(2), (d)(1).

54. *Id.* § 999.317(a).

55. See Int’l Ass’n of Privacy Prof’ls, *CCPA Enforcement: Enter the AG*, LINKEDIN (July 9, 2020, 12:00 PM), <https://www.linkedin.com/video/live/urn:li:ugcPost:6687036378548600832/>.

56. CAL. CIV. CODE § 1798.135(a) (West 2020).

57. *Id.* § 1798.140(c)(1).

58. See, e.g., *id.* § 1798.145(e).

59. *Id.* § 1798.155(b). Because of the thirty-day cure period, the Attorney General has not filed any enforcement actions by the deadline for this survey.

PROPOSITION 24—THE CALIFORNIA PRIVACY RIGHTS ACT OF 2020

When the proponents of Proposition 24 submitted the initiative for the November 2020 ballot, they included findings acknowledging that the CCPA gave consumers new privacy rights, which were weakened by the legislature in 2019.⁶⁰ Proposition 24 specifically states that its purpose is to “further protect consumers’ rights, including the constitutional right of privacy.”⁶¹

Proposition 24 requires businesses that control the collection of information, rather than those businesses that actually collect that information, take certain actions.⁶² Proposition 24 also requires businesses to disclose the categories of personal or sensitive personal information collected, whether that information is shared or sold, and the length of time that the business intends to retain each category of personal information.⁶³

Proposition 24 makes it easier for consumers to ask businesses to delete their personal information. Not only must the business delete the consumer’s personal information, but the business must notify its service providers or contractors to delete the consumer’s personal information and all third parties to whom it has sold or shared the consumer’s personal information to delete that information.⁶⁴

Proposition 24 creates new rights for consumers to correct inaccurate personal information maintained by a business.⁶⁵

Proposition 24 expands the use of the do not sell button to prevent the sharing of personal information. The proposition requires business to provide a clear and conspicuous link on their internet home page titled: “Do Not Sell or Share My Personal Information.”⁶⁶ Businesses will also be required to provide a link on their homepage entitled “Limit the Use of My Sensitive Personal Information.”⁶⁷

Proposition 24 broadens the exemptions for coverage from the CCPA for financial services companies.⁶⁸ The exemption under the Fair Credit Reporting Act is broadened to include activity involving the collection, maintenance, disclosure, sale, communication, or use of any personal information bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living by a consumer reporting agency, by a furnisher of that information, or by a user of a credit report, when complying with the Fair Credit Reporting Act.⁶⁹ Similarly, information collected, processed, sold, or disclosed subject to the federal Gramm-Leach-Bliley Act and implementing regulations, the California Financial Information Privacy Act, or the federal Fair Credit Reporting Act is not subject to the CCPA.⁷⁰

60. Proposition 24, *supra* note 8, § 2(C)–(D).

61. *Id.* § 3.

62. *Id.* § 4.

63. *Id.*

64. *Id.* § 5.

65. *Id.* § 6.

66. *Id.* § 13.

67. *Id.*

68. *Id.* § 15.

69. *Id.*

70. *Id.*

Changing the language from “pursuant to” to “subject to” provides financial services companies more protection because information is not collected, processed, sold, or disclosed *pursuant to* the acts, but the information may be *subject to* those acts. Proposition 24 also contains an employment information exception.⁷¹

Proposition 24 does not create a private right of action, except for certain data breaches.⁷²

Aside from substantive changes and additions, Proposition 24 also creates an independent agency, the California Privacy Protection Agency, to enforce privacy compliance in California.⁷³ This agency will be governed by a five-member board and will take over rulemaking authority for the CCPA from the California Attorney General’s Office.⁷⁴

Due to the strong support for privacy rights in California, voters approved Proposition 24 by a comfortable margin, so businesses should begin contemplating a compliance strategy in anticipation of the effective date of this law. However, businesses will have a considerable amount of time to comply with the new requirements, as the law will not become operative until January 1, 2023, and will only apply to personal information collected on or after January 1, 2022.⁷⁵

SUGGESTIONS FOR COMPLIANCE

The CCPA is effective and the Attorney General has begun enforcing it. Businesses should review and update their privacy policies to assure compliance with the Act, including informing consumers of their rights, and how to take advantage of their rights under the CCPA. Businesses need to confirm that they posted a “Do Not Sell” link on their website if they sell a consumer’s information and be prepared to implement the consumer’s request.

Businesses should know what personal information they collect, and why, where it is stored, how to access and produce it, and with whom it is shared or sold. Businesses should be prepared to delete that information, if necessary, and to have their third-party vendors or other persons with whom that information is shared or sold delete that information.

Businesses should also enhance their employee training so that they are able to answer consumers’ questions and implement their requests.

The Attorney General intends to enforce the CCPA. Businesses should be ready.

71. *Id.*

72. *Id.* § 16.

73. *Id.* § 24.

74. *Id.*

75. *Id.* § 31; *see supra* note 8.