



CCPA: Onset of Enforcement

A SUMMARY AND OVERVIEW FOR COMPLYING WITH CCPA OBLIGATIONS

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Agenda

- ▶ Background and Focus of the Law
- ▶ Applicability
- ▶ Compliance
 - ▶ The Eights Focus Areas of Compliance
 - ▶ Independent Obligations
- ▶ Potential Defenses
- ▶ CCPA in the Employment Context
- ▶ Enforcement
 - ▶ Private Causes of Action
 - ▶ AG Enforcement
- ▶ Ongoing Evolution of the CCPA
- ▶ Questions

Background and Focus of the CCPA

- ▶ In 2018, the Californians for Consumer Privacy (“CCP”) group sponsored the California Consumer Privacy Act (CCPA) ballot referendum for the general election.
- ▶ Following the ballot certification, CCP made a deal with California legislature for passage of similar law in exchange of withdrawal of ballot initiative.
- ▶ The bill was quickly passed in 2018.
- ▶ CCPA Three Principles – **Transparency, Control, Accountability**
 - ▶ From the testimony of Alastair Mactaggart (Chair for CCP) before U.S. Senate Committee on October 10, 2018

Background and Focus of the CCPA

– Ongoing Evolution of the Law

- ▶ Seven legislative amendments have been signed into law amending the CCPA
- ▶ Five amendments are still live
- ▶ Three sets of CCPA proposed regulations with Final Set being approved by the California Office of Administrative Law (OAL) on August 1, 2020
- ▶ Proposition 24 – Consumer Personal Information Law and Agency Initiative (E.G. CCPA 2.0) .

Applicability

For-profit organizations that collect **“personal information”** from **“California residents”** and:

- ▶ Have annual gross revenues in excess of twenty-five million dollars (\$25,000,000); or
- ▶ Buy, receive, sell, or share for commercial purposes, the personal information of 50,000 or more consumers, households, or devices; or
- ▶ Derives 50 percent or more of its annual revenues from selling consumers' personal information.

Applicability – Affiliated Organizations

CCPA applies to a Company if:

- ▶ Company owns (or has the voting power of) more than 50% of the outstanding shares of any class of another company's voting security and the affiliated company is subject to CCPA
- ▶ Company controls the election of majority directors of another company and the affiliated company is subject to CCPA
- ▶ Company exercises "controlling influence over the management" of another company (e.g., controlling or parent company)
- ▶ Company shares common branding with parent or controlling company that is subject to the CCPA
 - ▶ Common branding means a shared name, service-mark, or trademark.

Best Practices for Sibling Corporations?

- ▶ If parent company is indirectly subject to CCPA through one of its subsidiaries its other subsidiaries are not necessarily subject to CCPA.
- ▶ Best practice may be to roll out privacy and security changes across all companies for purpose of consistency and adaptability from change of management/executives.

Applicability – “Personal Information”

- ▶ Broad definition - Information that identifies, relates to, describes, **can be associated with or reasonably capable of being associated with a particular consumer or household.**
- ▶ Direct Identifiers - Name, alias, address, unique personal identifier, online identifier, internet protocol address, email address, account name, social security number,
- ▶ Characteristics of protected classifications under California or federal law;
- ▶ Commercial Information
 - ▶ Records of personal property, products, or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies
- ▶ Biometric information
- ▶ Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer’s interaction with an internet website, application, or advertisement;

Applicability – “Personal Information”

- ▶ Geolocation data;
- ▶ Audio, electronic, visual, thermal, olfactory, or similar information;
- ▶ Professional or employment-related information; and
- ▶ Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (FERPA).
- ▶ The definition also pulls in inferences from personal information used to create a profile about a consumer that would reflect the person’s preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.



Applicability – “Personal Information”

- ▶ Personal information does not include publicly available information, aggregated information and deidentified information, as defined by the statute nor information covered and collected under HIPPA, CMIA, FRCA, GLBA, FIPA, DPPA
- ▶ Must apply this exception with caution. Institutions covered by the aforementioned statutes may have data that is covered by the CCPA.
 - ▶ For example financial institutions may have data covered by CCPA because it was not collected under GLBA.

Applicability – Personal Information and IP Addresses

- ▶ The CCPA's definition of personal information expressly contemplates including IP addresses.
 - ▶ Listed as “Identifier” under 1798.140(o)(1)(a)
- ▶ Regulations Issued on 2/10/20:
 - ▶ “[I]f a business collects the IP addresses of visitors to its websites **but does not link** the IP address to any particular consumer or household, and could not reasonably link the IP address with a particular consumer or household, then the IP address would not be ‘personal information.’”
- ▶ Language does not appear in Final Regulations
- ▶ Broadest Interpretation Possible - If any ISP could tie an IP address to an individual, the IP address would be personal data.
 - ▶ The counter argument is that even if ISP **can** do so, does this make the IPA data as something that can “reasonably” be associated with consumer or household.

Applicability – “California Resident”

- ▶ Every individual who is in the State for other than a temporary or transitory purpose
- ▶ Every individual who is domiciled in the State who is outside the State for a temporary or transitory purpose.
- ▶ All other individuals are nonresidents.
- ▶ Under this definition, a person is a resident even if not domiciled if they are in California for “other than a temporary or transitory purpose.”
- ▶ People who are temporarily in the state for a short, definite period of time are probably not residents
- ▶ *Those who are in California for an indefinite or long amount of time probably are residents, both for the purposes of taxes and the rights and restrictions that are a part of the CCPA.*

18 CCR 17014

Applicability – Wide Ranging

- ▶ The law does not restrict itself to online businesses.
 - ▶ CCPA is “not limited to information collected electronically or over the Internet, but [the law applies] to the collection and sale of all personal information collected by a business from consumers.”
- ▶ Thus, the law equally applies to online and offline businesses.

Eight Consumer Rights Enumerated by CCPA

1. Consumer right to request abbreviated disclosures about the personal information business collects
 1. § 1798.100
2. Consumer right to request expanded disclosure regarding the personal information business collects
 1. § 1798.110(a)
3. Consumer right to request disclosure regarding the personal information that business sells or discloses for a business purpose
 - ▶ § 1798.115
4. Consumer right to opt-out of sale of personal information
 - ▶ § 1798.120

Eight Consumer Rights Enumerated by CCPA

5. Consumer right to opt-in for the sale of a minor's personal information
 - ▶ § 1798.120(c)
6. Consumer right to request business delete personal information collected
 - ▶ § 1798.105
7. Consumer right to access personal information
 - ▶ § 1798.100(d)
8. Consumer right not be discriminated against for exercising any of the rights granted by the CCPA
 - ▶ § 1798.125

Right to Request Abbreviated Disclosures About PI Collected

- ▶ Provides a consumer the right to request that a business disclose the categories and specific pieces of PI collected about them.
- ▶ Business Must:
 - ▶ Verify identity of Consumer
 - ▶ Disclose the “required information.”
 - ▶ Does not require providing the “actual data.”
- ▶ Requires Specific Notice “before the point of collection” of the categories of personal information to be collected and the purposes for which the categories of personal information shall be used.

§ 1798.100

Verification Examples

- ▶ Example 1: If a business maintains personal information in a manner associated with a named actual person, the business may verify the consumer by requiring the consumer to provide evidence that matches the personal information maintained by the business. For example, if a retailer maintains a record of purchases made by a consumer, the business may require the consumer to identify items that they recently purchased from the store or the dollar amount of their most recent purchase to verify their identity to a reasonable degree of certainty.
- ▶ Example 2: If a business maintains personal information in a manner that is not associated with a named actual person, the business may verify the consumer by requiring the consumer to demonstrate that they are the sole consumer associated with the personal information. Business may reasonably verify a consumer by asking them to provide information that only the person who used the mobile application may know or by requiring the consumer to respond to a notification sent to their device.

Expanded Right to Know PI Collection

- ▶ Provides a consumer the right to request that a business disclose:
 1. The categories and specific pieces of PI collected
 2. Sources from which the PI is collected
 3. The business or commercial purpose of collection,
 4. To whom the collected PI is shared (i.e., third-party sharing)
 5. Specific pieces of PI that has been collected about consumer
- ▶ Category 1 and 5 are the same as Abbreviated Request
- ▶ Company Privacy Policy must provide method for requesting information by at least two or more designated methods (i.e., e-mail, toll-free number, designated webpage)

§ § 1798.110; 1798.130(b)(5)

Right to Know if PI is Being Sold or Shared for Business Purpose

- ▶ Provides consumers the right to request that a business disclose for the previous 12 months:
 - ▶ The categories of PI collected and sold;
 - ▶ The categories of third parties to whom data is sold;
 - ▶ The categories of PI disclosed about the consumer for a business purpose.
- ▶ Sale is broadly defined and includes renting, releasing, disclosing, or otherwise communicating a consumer's personal information to a third party for monetary or other valuable consideration.
 - ▶ However, CCPA does not define valuable consideration.
- ▶ Disclosure must be made within 45 days unless extension.
- ▶ Consumers have the right to receive specific notice of the business' PI sale practices (before sale of data is made) as well as notice of these rights within the business' general privacy policy.

§ 1798.115

Right to Opt-Out of Sale of Data

- ▶ Gives consumers or their authorized agents the ability to direct businesses to stop selling their PI to third parties.
- ▶ Consumers have the right to receive notice of these rights within the business' general privacy policy.
- ▶ Obligations:
 - Provide notice and means to opt-out prior to sale
 - “Do Not Sell My Personal Information” hyperlink on homepage & privacy policy (§ **1798.135.**)
- ▶ Respect the opt-out for at least 12 months before requesting again.
- ▶ Use PI collected to facilitate an opt-out only for opt-out.

§§ 1798.120; 1798.135

Exceptions to Sale of Data

Service Provider Exception:

- ▶ Service Provider is defined as a business that processes information on behalf of another business
- ▶ Sharing personal information with a service provider is not a “sale” if:
 1. The business provides notice of its sharing in its Opt-Out Notice; and
 2. No further collection, sale or use by the vendor
- ▶ This exception will not apply where:
 1. No written contract
 2. Contract allows the vendor to retain personal information beyond termination.
 3. Contract allows the vendor to use personal information (in any form) for its own purpose
 4. Contract allows the vendor to make decisions about the disclosure of personal information.
- ▶ A business must direct a service provider to delete consumers' personal information following a verifiable consumer request.

Exceptions to Definition for Sale of Data

- ▶ Consumer using business to intentionally interact with third party (1798.140(t)(2)(a))
- ▶ Responding to opt-out requests (1798.140(t)(2)(b))
- ▶ Transfer of data in connection with a merger or acquisition (1798.140(t)(2)(D))

Requirement for Opt-In for Children Data Prior to Sale

- ▶ CCPA prohibits the sale of data for individuals under 16 years of age without affirmative opt-in.
- ▶ Consumer between 13 and 16 years of age can provide their own affirmative authorization
- ▶ Consumer under 13 years of age must provide affirmative authorization from consumer's parent or guardian
- ▶ "Affirmative authorization" means an action that demonstrates the intentional decision by the consumer to opt-in to the sale of personal information.

§ 1798.120(c); 20 CCR 999.301(a)



Deletion Rights

- Gives consumers the right to request that a business delete their PI after receipt of a verifiable request.
- In support of this right, consumers have the right to receive notice of their right to deletion within the business' general privacy policy.

§ 1798.105

Defenses to Deletion Rights

1. Completing a contractual obligation between business and consumer
2. Data security;
3. Debug/ID or repair errors;
4. Exercise free speech;
5. Comply with Cal. ECPA;
6. Engage in public or peer reviewed scientific, historical or statistical research;
7. Enable solely internal uses that are aligned with consumer expectations based on consumer's relationship with the business;
8. Internal use that is compatible with context with which the consumer processed the information.
9. Legal obligations

Right Not to Be Discriminated for Exercising CCPA Rights

- ▶ Consumers cannot be discriminated against for exercising their rights under the CCPA.
- ▶ Examples
 - ▶ Denying goods or services to the consumer
 - ▶ Charging different prices or rates for goods or services
 - ▶ Providing a different level or quality of goods or services to the consumer,
 - ▶ Suggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services.

§ 1798.125

Discrimination Examples

- ▶ Example 1: A music streaming business offers a free service as well as a premium service that costs \$5 per month. If only the consumers who pay for the music streaming service are allowed to opt-out of the sale of their personal information, then the practice is discriminatory, unless the \$5-per-month payment is reasonably related to the value of the consumer's data to the business.
- ▶ Example 2: A grocery store offers a loyalty program whereby consumers receive coupons and special discounts when they provide their phone numbers. A consumer submits a request to opt-out of the sale of their personal information. The retailer complies with their request but no longer allows the consumer to participate in the loyalty program. This practice is discriminatory unless the grocery store can demonstrate that the value of the coupons and special discounts are reasonably related to the value of the consumer's data to the business

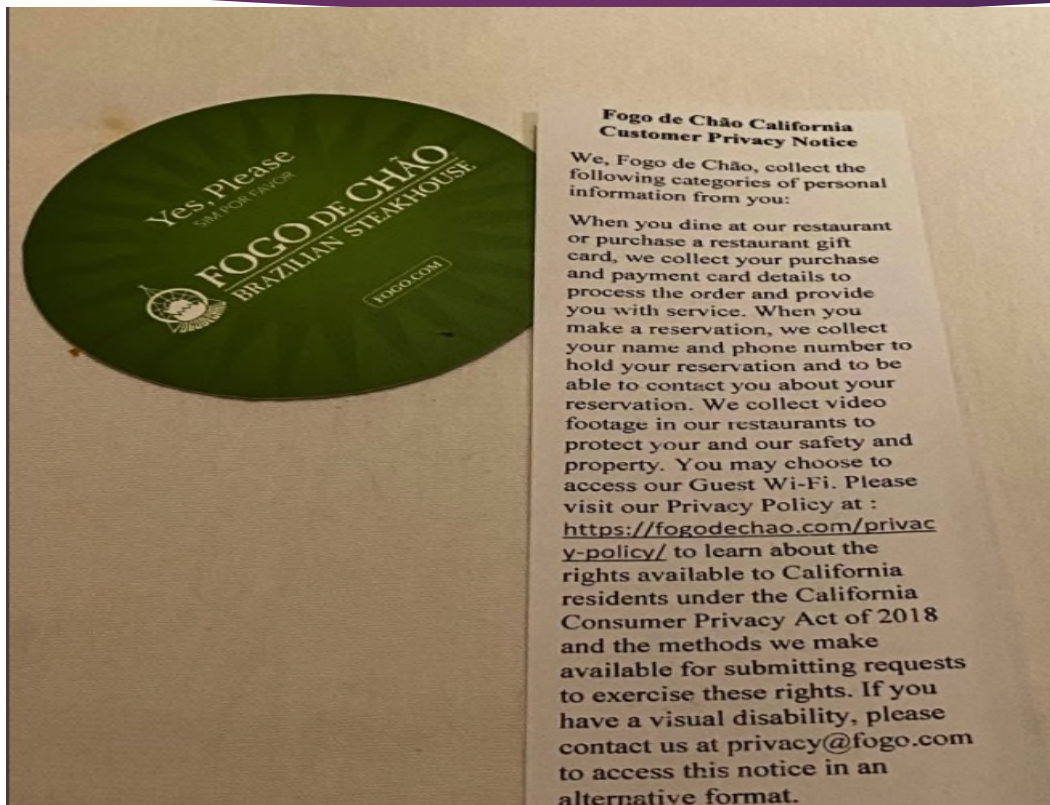
Notices and Privacy Policy

- ▶ Every business subject to CCPA must provide CCPA compliant privacy policy. (20 CCR 999.304)
- ▶ A business that collects personal information from a consumer must provide notice at or before the point of collection about the categories of personal information to be collected from them and the business or commercial purposes for which the personal information will be used and a link to the business privacy policy (20 CCR 999.305)
- ▶ A business that sells personal information must provide a notice of right to opt-out and information about “Do Not Sell My Personal Information” webpage link (20 CCR 999.306).
- ▶ A business that offers a financial incentive or price or service difference shall provide a notice of financial incentive. (20 CCR CCR 999.307.)

Notice Examples

- ▶ When a business collects consumers' personal information online, it may post a conspicuous link to the notice on the introductory page of the business's website and on all webpages where personal information is collected.
- ▶ When a business collects personal information through a mobile application, it may provide a link to the notice on the mobile application's download page and within the application, such as through the application's settings menu.
- ▶ When a business collects consumers' personal information offline, it may include the notice on printed forms that collect personal information, provide the consumer with a paper version of the notice, or post prominent signage directing consumers to where the notice can be found online.
- ▶ When a business collects personal information over the telephone or in person, it may provide the notice orally.

Notices and Privacy Policy



Fogo de Chão California Customer Privacy Notice

We, Fogo de Chão, collect the following categories of personal information from you:

When you dine at our restaurant or purchase a restaurant gift card, we collect your purchase and payment card details to process the order and provide you with service. When you make a reservation, we collect your name and phone number to hold your reservation and to be able to contact you about your reservation. We collect video footage in our restaurants to protect your and our safety and property. You may choose to access our Guest Wi-Fi. Please visit our Privacy Policy at : <https://fogodechao.com/privacy-policy/> to learn about the rights available to California residents under the California Consumer Privacy Act of 2018 and the methods we make available for submitting requests to exercise these rights. If you have a visual disability, please contact us at privacy@fogo.com to access this notice in an alternative format.

Permissible Financial Incentives and Value Related to Consumer Data

► Permissible Financial Incentives

1. Incentive must be reasonably related to the value of the consumer data;
2. Clearly describes the material terms of the financial incentive program before enrolling the consumer;
3. Only provides on an opt-in basis;
4. Consumer can revoke consent at any time.

► Value Provided Related to Consumer Data

- A business may also offer a different price, rate, level, or quality of goods or services to the consumer if that price or difference is directly related to the value provided to the business by the consumer's data.

Exceptions and Defenses to General Requirements

In September 30, 2019, Legislature included one year extension in applying most of the CCPA to the following categories of personal information collection:

▶ **Business 2 Business Communications**

- ▶ Personal information collected and used in business-to-business communications and transactions (AB-1355).
- ▶ Does not exempt a CCPA-covered business from its “Do Not Sell” obligations

▶ **Personal Information Obtained for Application or Employee**

- ▶ Personal information exempt from information collected for purposes of an employment or similar relationship (AB-25).
- ▶ Does not exempt a CCPA-covered business from CCPA private right of action from employees
- ▶ Does not exempt a CCPA-covered business from its “Do Not Sell” obligations

Exceptions and Defenses to General Requirements

▶ **Deidentified Data**

- ▶ Data that cannot be linked to a particular consumer (it omits any reference to household here).
- ▶ The act also requires businesses that use deidentified data implement technical safeguards and business processes that prohibit reidentification or inadvertent release of deidentified information
- ▶ Businesses must also make no attempts to reidentify the data. Cal. Civ. Code Section 1798.140(h)
- ▶ Concern is whether deidentified data can be combined with external information later

▶ **Aggregated Data**

- ▶ Information that relates to a group or category of consumers, from which individual consumer identities have been removed, that is not linked or reasonably linkable to any consumer or household, including via a device." Cal. Civ. Code Section 1798.140(a)

▶ **Information subject to HIPPA, CMIA, FRCA, GLBA, FIPA, DPPA**

- ▶ Note – Just because data is exempt due to applicability of these statutes does not mean that business may not have other CCPA-triggering data that is not covered by these statutes.

Exceptions and Defenses to General Requirements

- ▶ **Publicly available information from government records**
 - ▶ Information made available by government agencies
- ▶ **Single, One-Time Transaction**
 - ▶ Where information is not sold or retained by the business

Arbitration Agreements

- ▶ Private right of action, combined with the broad data breach notice requirement and the availability of statutory damages, makes the CCPA a significant class action risk
- ▶ Despite the language in the CCPA, the United States Supreme Court has consistently affirmed the strong federal policy favoring arbitration and the enforceability of class action waivers in arbitration agreements.
- ▶ 2015 Supreme Court decision affirmed permissible use of class-wide waivers. *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015)
- ▶ Companies should consider voluntary class action waivers
 - ▶ Requires affirmative consent from consumer

Training Obligations

Training should be provided (and documented) to all persons responsible for handling consumer inquiries re:

- ▶ Abbreviated and Expanded Disclosure Right;
- ▶ Right to Request Information from Businesses That Sell Data;
- ▶ Requirements for “Do not Sell” data;
- ▶ Right not to be discriminated against;
- ▶ How to direct consumers to exercise their rights;

1798.130(a)(6); 1798.135(a)(3)

Obligation to Provide Designated Methods for Submitting Requests

- ▶ Organization must provide two or more designated methods for consumers to submit assert selected rights.
 - ▶ A business that operates exclusively online and has a direct relationship with a consumer from whom it collects personal information shall only be required to provide an email address for submitting requests to know
- ▶ This applies for Consumer's requests under:
 - ▶ Abbreviated disclosure rights
 - ▶ Expanded disclosure rights
 - ▶ Right to request sold/disclosed PI
 - ▶ Right to opt out of the sale of PI
 - ▶ Right to not be discriminated against
 - ▶ Right to access data and the right to delete their PI.
- ▶ Potential Methods
 - ▶ A toll-free phone number, a designated email address, a form submitted in person, a form submitted through the mail, and user-enabled global privacy controls, such as a browser plug-in or privacy setting, device setting

§17987.130(a)(1)(A)

Enforcement – Private Right of Action

- ▶ A consumer can institute a civil action for the unauthorized access and exfiltration, theft, or disclosure of their nonencrypted PI as a result of the business' violation of their duty to **implement and maintain reasonable security procedures and practices**.
- ▶ Consumer may:
 - ▶ Recover damages not less than \$100 and not greater than \$750 per consumer per incident or actual damages, whichever is greater;
 - ▶ Seek injunctive or declaratory relief; and/or
 - ▶ Any other relief the court deems proper.

§ 1798.150(a)(1)

Enforcement – Private Right of Action

- ▶ For the “unauthorized access and exfiltration, theft or disclosure” due to a business’ failure to “implement and maintain reasonable security procedures appropriate to the nature of the information.” Cal. Civ. Code § 1798.150(a)(1)
- ▶ Private causes of action are for data breaches arising from failure to maintain reasonable security measures, and not any other failures to comply with the CCPA. Cal. Civ. Code § 1798.150(c)
- ▶ “Reasonable Measures” undefined in CCPA
 - ▶ Other statutes:
 - ▶ New York Department of Financial Services Cybersecurity Regulation
 - ▶ Europe’s General Data Protection Regulation (GDPR) - **Articles 23 & 30**

Enforcement – Private Cause of Action

Opportunity to Cure within the 30 days specified

- ▶ If business cures then the plaintiff cannot seek statutory damages.
 - ▶ Note, pecuniary damages are still available.
- ▶ The statute does not define “cure.”
 - ▶ How can a business successfully “cure” data security violations?

The private right of action provision selects a narrower definition of “personal information” than is used throughout the rest of the CCPA and include only:

- ▶ an individual’s name along with his or her
- ▶ social security, driver’s license, or California identification card number;
- ▶ account, credit card, or debit card number, in combination with a code or password that would permit access to a financial account; or
- ▶ medical or health insurance information.

§§ **1798.150(a)(1)**; 1798.81.5(d)(1)(A).

Enforcement by Attorney General

All violations

- ▶ The AG has declined to delay the enforcement date.
 - ▶ “Businesses have been aware of the requirements that could be imposed as part of the OAG’s regulations,” given that the “proposed rules were released on October 11, 2019, with modifications made public on February 10, 2020 and March 11 2020.”
- ▶ Prosecutorial Discretion
 - ▶ The AG stated: “To the extent that the regulations require incremental compliance, the OAG may exercise prosecutorial discretion if warranted, depending on the particular facts at issue.”
- ▶ \$100 - \$750 per incident
 - ▶ Penalty will be based on the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.

§ 1798.150(a)(2).

Continuing Evolution of the CCPA – Proposition 24 – Clarifying and Expanding Rights and Obligations

- ▶ A California ballot initiative known as the California Privacy Rights Act is on the ballot for the general election on November 3rd.
- ▶ Would expand private right of action
- ▶ Would create state agency to pursue claims with administrative procedures
- ▶ Businesses would need to contend with a new opt-out right to “Limit the Use of My Sensitive Personal Information”
- ▶ The existing right to opt out of the “sale” of information would explicitly apply to any personal information that is “shared” for behavioral advertising purposes.
- ▶ The CPRA would create an affirmative requirement for businesses to maintain reasonable security for all categories of personal information as defined in the CCPA.
- ▶ A new right that permits California consumers to have inaccurate personal information corrected, in addition to the rights to access and delete personal information granted by the CCPA.

Continuing Evolution of the CCPA – Proposition 24 – Clarifying and Expanding Rights and Obligations

Includes numerous clarifications regarding some ambiguities for CCPA:

- ▶ “Personal information” would no longer include information that is manifestly made public by the individual or the media.
- ▶ Businesses that receive deletion requests would be expressly permitted to maintain records of these requests for compliance purposes.
- ▶ Consumers could no longer require a business to generate a list of “the categories of personal information it has collected about that consumer” in response to access requests.
- ▶ “Service providers” and “contractors” would not need to respond directly to consumer requests to access or delete information.

Tracking to be passed - <https://www.caprivacy.org/new-poll-from-goodwin-simon-research-shows-prop-24-the-california-privacy-rights-act-receives-81-support-from-voters/>

CCPA and Employment

- ▶ AB 25 delayed the deadline for compliance with certain CCPA requirements with respect to California employees (and job applicants) until Jan. 1, 2021.
- ▶ Requirement Not Delayed
 - ▶ Provide Privacy Notice, e.g., at or before the time data is collected, a business must inform a California employee/job applicant of the categories and specific pieces of “personal information” it is collecting, and disclose the purpose for which the “personal information” will be used
- ▶ If employee is also consumer then all requirements apply
- ▶ Employees maintain private cause of action under CCPA
 - ▶ E.g. liability for breach of personal information due to business failing to implement and maintain reasonable security procedures/practices
- ▶ AB 1281
 - ▶ Currently with Committee on Judiciary.
 - ▶ Would extend the exemption for employment and business-to-business information until January 1st contingent on Proposition 24 Not being Passed (Unlikely)



Questions?



Thank You!

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