

Privacy Series from Parsons Behle & Latimer

The CCPA: A Primer

Carley L. Herrick

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Outline

- Overview of the CCPA
- Exemptions to the CCPA
- Overview of the CPRA
- 2021 Privacy Laws

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CCPA at a Glance

- The CCPA regulates when business collect personal information for their own business purposes or to resell that information.
- The CCPA requires organizations to develop:
 - security plans,
 - responses to consumer requests,
 - public privacy disclosures,
 - data processing agreements,
 - Allow consumers to opt out of the sale of their information, and
 - Procedures for restricting the sale of minors' information without a specific opt in from the minor or the minor's guardian.

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CCPA - Does it Apply?

- The CCPA applies to organizations that do business in California that:
 - Have revenue of at least \$25,000,000;
 - Information belonging to at least 50,000 California consumers;
or
 - At least 50% of the organization's revenue comes from selling consumer information.

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CCPA – Key Terms?

- Consumer: A natural person who is a California resident.
- Personal Information: 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. This includes:
 - Names and aliases,
 - Postal address,
 - Online identifiers,
 - Government-issued identification numbers,
 - IP address,
 - Email address, and
 - Account name.

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CCPA – What are the Requirements?

- Consumer's Rights
 - A consumer can request information from the organization has gathered about the consumer. The organization must provide the categories of data gathered and the specific pieces of personal information collected.
 - A consumer can request that an organization delete information collected from the consumer. The organization must also tell third-party processors to delete that information as well.
 - For the 12-month period prior to the consumer request, disclose the information an organization gathered about a consumer.
 - Consumers have the right to tell an organization not to sell their information to third parties.

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CCPA – What are the Requirements?

- Organizational Obligations:
 - Verify consumer identities when responding to consumers' requests
 - Post a publicly available notice stating the following:
 - The categories of personal information collected about the consumer;
 - Disclose the sources from which the personal information is collected;
 - Disclose the business or commercial purpose for collecting or selling personal information;
 - The categories of third parties with whom the business shares personal information; and
 - The specific pieces of information it has collected about the consumer.
 - Not use information for a purpose not specified in the notice.

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CCPA – What are the Requirements?

- Organizational Obligations Continued:
 - If an organization sells consumer data to other parties, it must give consumers a notice allowing the consumer to opt-out of that sale.
 - Not sell information that belongs to minors under the age of 13, and only sell information belonging to minors between the ages of 13 and 16 with approval from a parent/guardian who has opted in to the sale of such information.
 - Not discriminate against a consumer because a consumer exercises their privacy rights.
 - Give consumers at least two methods to contact the organization for consumer requests.

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CCPA – What are the Requirements?

- Organizational Obligations Continued:
 - Provide a clear and conspicuous link on the organization’s website titled, “Do Not Sell My Personal Information” so that a consumer can opt out of the sale of their information without creating an account to opt out of that sale of information.
 - Develop, implement, and maintain security policies and procedures to protect personal information.
 - Develop data processing agreements that prevent third-parties from selling information provided by the organization.

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CCPA – FCRA Exemption

- The CCPA exempts personal information in a consumer report that (1) is sold to or from a consumer reporting agency for the purpose of generating consumer reports; and (2) is limited in use under FCRA.
- The CCPA defines a “sale” of personal information as “selling, renting, releasing, disclosing, disseminating, making available, transferring or otherwise communicating orally, in writing or by electronic or other means a consumer’s personal information by the business to another business or a third party *for monetary or other valuable consideration*.”
- The CCPA’s definition of “personal information” is broad. However, a consumer report under FCRA contains a narrow subset of personal information that is:
 - Communicated by a consumer reporting agency;
 - Bears on credit-worthiness and other consumer characteristics;
 - Is used or expected to be used in establishing eligibility for credit, insurance, or other specified purposes.

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CCPA –GLBA Exemption

- The CCPA exempts “personal information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act, and implementing regulations.”
- The CCPA’s definition of “personal information” is broad. However, GLBA applies to a narrower category of “personally identifiable financial information,” which includes
 - Information a consumer provides to a financial institution “to obtain a financial product or service”
 - Information about a consumer resulting from any transaction involving a financial product or service between the company and the consumer
 - Information a financial institution otherwise “obtains about a consumer in connection with providing a financial product or service to that consumer.”

CCPA –Exemption to the Exemptions

- Exception to the exemptions: consumers can still sue a company under the CCPA for data breaches even if they are exempt from complying with the CCPA.

CCPA – Exemptions

- Employee data is exempt from most requirements with two exceptions:
 - The obligation to notify employees about collected data.
 - The private right of action still applies to employee data.
- The exemption expires on January 1, 2022.

CCPA Penalties

- There is a private right of action; consumers can sue corporations for data breaches for \$100 - \$750 per person, per incident.
- Intentional violations can accrue regulatory fines from the AG for \$2,500 for accidental violations and 7,500 for each intentional violation of the statute.
 - The AG may apply the fine on a per person per day basis.

What is the CPRA?

- The California Privacy Rights Act
- Created by the same person who initially created the CCPA, Alastair Mactaggart.
- They have used California's ballot initiative process to amend the CCPA which will make it exceedingly difficult to change in the future.
- Will Mactaggart withdraw the initiative like he did with the CCPA? Unlikely. He saw the CCPA and the process after the CCPA as "attempts to weaken what [he sees] as a fundamental human right"

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Key Changes - Jurisdiction

- The CPRA will apply to organizations:
 - With more than \$25m in revenue;
 - Buys, sells, or shares information from 100,000+ consumers or households; or
 - Makes 50% of its revenue from selling or sharing consumers' personal data.

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Key Changes – “Sale”

- Recall that the definition of a “Sale” in the CCPA is the exchange of data for anything of value.
- The CPRA clarifies this language and states that a sale includes sharing data with third parties.
- Eliminates the service provider exemption.
- Consumers can opt-out of the sale or sharing of their information with third parties.

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Key Changes – Contracts with Third Parties

- The CCPA didn't have contracting requirements unless you wanted third parties to qualify as Service Providers.
- The CPRA requires data processing agreements like what we've seen from the GDPR.

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Key Changes – Consent

- The CCPA didn't have robust consent requirements.
- An organization does not need to comply with opt-out rules if they have consent from a consumer to gather information.
- Consent must be specific, informed, and unambiguous.

Key Changes – Privacy Rights

- The CPRA expands privacy rights in two areas:
 - automated decision making; and
 - Correcting inaccurate data.

Key Changes – Marketing

- The CPRA bans Cross-Context Behavioral Advertising: ads that target consumers based on a profile or predictions about the consumer related to the consumer's activity over time and across multiple businesses or distinctly branded services, websites, or applications.

Key Changes – GDPR Concepts

- The CPRA adopts concepts such as data minimization and purpose limitations when using personal information.

Key Changes - Enforcement

- Creates the California Privacy Protection Agency which has broad scope and responsibilities to enforce the CPRA.
 - Careful, there is every incentive for this organization to fine companies so it can generate revenue for itself and the state.
- Creates a 30-day cure period for the private right of action only. The 30-day cure does not apply to technical violations of the law.

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Other Privacy Laws to Watch for in 2021

- CCPA Approach
 - New Hampshire
 - New York (plus data fiduciary)
 - New Jersey
 - Nebraska
- GDPR Approach
 - Washington
 - Virginia
 - Illinois

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Thank You

- If you have any questions, you can contact:
Carley Herrick
Cherrick@parsonsbehle.com
801.536.6707

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