

CALIFORNIA CONSUMER PRIVACY ACT



CCPA Webinar: Amendments, Proposed Regulations, New Ballot Initiative, and Related Nevada Law

November 6, 2019

Arsen Kourinian

Roadmap for Webinar

- ❑ Amendments to the CCPA, which were signed into law on October 11, 2019.
- ❑ Attorney General's proposed regulations, which were issued on October 10, 2019.
- ❑ The California Privacy Rights and Enforcement Act of 2020 proposed by Alastair Mactaggart.
- ❑ Nevada's new data privacy law (SB220).

CCPA Amendments (Five)

One-Year Exemption

AB-25 – Employee/Contractor One-Year Exemption

- Original CCPA text defined “consumer” so broadly that it would include employees/contractor information. AB-25 creates an exemption for this type of personal information.
- Personal information collected by business from job applicants, employees, owners/directors/officers, medical staff, and contractors within the context of the person’s role or former role in those categories.
- Emergency contact information collected from these individuals.
- Personal information collected to administer benefits.
- Exemption inoperative on January 1, 2021.
- Not a complete exemption – does not apply to the following:
 - Section 1798.100(b) – Notice to employee/consumer at or before point of collection regarding categories of personal information/purpose.
 - Section 1798.150 – Private cause of action for data breaches:
 - “Any consumer whose nonencrypted or nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information may institute a civil action. . . .”



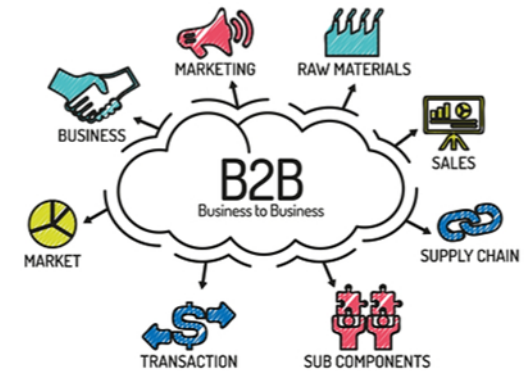
One-Year Exemption

AB-1355 – Business-to-Business Exemption

- Personal information relating to communication/transaction between business and natural person on behalf of company, partnership, sole proprietorship, nonprofit or government agency, i.e., employee, owner, director, officer, or contractor.

- Exemption inoperative on January 1, 2021.

- Not a complete exemption – does not apply to the following:
 - (A) Section 1798.120 – Consumer right to opt-out of sale:
 - “A consumer shall have the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. This right may be referred to as the right to opt-out.”
 - (B) Section 1798.150 – Private cause of action for data breaches.



One-Year Exemption



Practical Tips

- Businesses need to decide whether to take advantage of these exemptions or take steps to comply with the CCPA regardless of the exemptions.
- Issues to Consider
 - (1) Do you **only** collect personal information that falls within the employee/contractor or business-to-business exemptions?
 - It might make sense to not implement compliance with all of the CCPA's provisions until there is clarity next year regarding whether the exemptions will become permanent.
 - Or take practical steps to implement CCPA provisions for good business practice.
 - (2) Do you collect a **mix of personal information** that falls within the exemptions and other personal information?
 - It might be burdensome and costly to try to segregate the employee or B2B personal information from the personal information you collect from the individuals buying your products or services.
 - It might make sense to apply the CCPA across the board.

Product Warranty or Recall and Vehicle Information

AB-1146 – Carve Out for Right to Delete and Opt-Out of Sale

- A business or service provider does not need to comply with a consumer's request to delete personal information if the personal information is needed to fulfill the terms of a written warranty or product recall conducted in accordance with federal law.

- The right to opt-out does not apply to vehicle or ownership information retained or shared between a new motor vehicle dealer and vehicle's manufacturer if shared for vehicle repair covered under warranty or recall.
 - New motor vehicle dealer or vehicle manufacturer cannot then sell, share or use information for any other purpose.



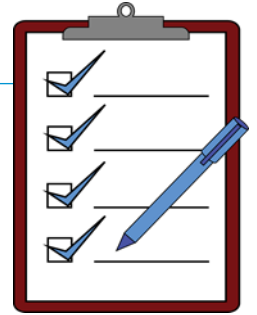
Methods for Requests

AB-1564 – Online Businesses

- ❑ CCPA required a toll-free number for consumers to submit requests.
- ❑ This amendment states that if a business operates **exclusively online** and has a direct relationship with the consumers from whom it collects personal information, it is only required to **provide an email address for consumers to submit requests** for information under Sections 1798.110 and 1798.115.
- ❑ If business **maintains an internet website**, it should make the **website available to consumers to submit requests** for information under Sections 1798.110 and 1798.115.



Other Amendments



AB-874 and AB-1355

Definition of personal information (AB-874):

- Corrects second sentence of definition for personal information to indicate that personal information has to “reasonably” be capable of being associated with consumer/household.
- Clarifies that “personal information” (instead of “publicly available”) does not include deidentified or aggregate consumer information.

Don't need to collect or retain more than before (AB-1355):

- CCPA does not require a business to collect personal information that it would otherwise not collect in the ordinary course of its business or retain personal information for longer than it would otherwise retain such information in the ordinary course of business.

Other Amendments



Non-Discrimination (AB-1355)

- Clarifies exception to CCPA rule precluding a business from discriminating against a consumer for exercising his or her rights.
- Exception now states that a business can charge a different price or rate or provide a different level or quality of good or services to consumers, if the difference is reasonably related to value provided to the **business**. Before it used to say value provided to the **consumer**.

Fair Credit Reporting Act Exemption (AB-1355)

- The CCPA exemption related to the FCRA has been updated to clearly define the type of activity and information that falls within the purview of the exemption.
- Also, clarifies that the private right of action under Section 1798.150 still applies.

ATTORNEY GENERAL CCPA PROPOSED TEXT OF REGULATIONS



Attorney General Proposed Regulations

- ❑ Under the CCPA, the Attorney General was required to solicit broad public participation and adopt regulations.

- ❑ October 11, 2019 – Proposed Text Issued.
- ❑ December 2 to 5, 2019 – Public Hearings.
- ❑ December 6, 2019 - Deadline to Submit Written Comments.
- ❑ ??? – Final Regulations.

- ❑ Section 1798.185(c) – “The Attorney General shall not bring an enforcement action under this title until six months after the publication of the final regulations issued pursuant to this section or July 1, 2020, whichever is sooner.”



Overview

Detailed guidelines regarding:

- How businesses need to provide notices.
- Prepare their privacy policies.
- Respond to consumer requests.
- Verify consumer identity.
- Maintain compliance records.

Practical Tips



- The proposed regulations provide your business detailed instructions for you to adopt in your compliance program.
- Read them carefully – detailed definitions and requirements.
- We will cover the major topics from the proposed regulations.

Notices to Consumers

Types of notices, which will be part of your privacy policy

- ❑ (1) The information businesses collect about consumers and the purpose for the collection.
- ❑ (2) Consumers' right to opt-out of the sale of their personal information.
- ❑ (3) The financial incentive or price or service difference a business may offer in exchange for retaining or selling consumers' personal information.
- ❑ (4) Consumers' right to request their personal information be deleted.
- ❑ (5) How consumers can request information regarding a business's personal information collection and disclosure practices.



Notices to Consumers

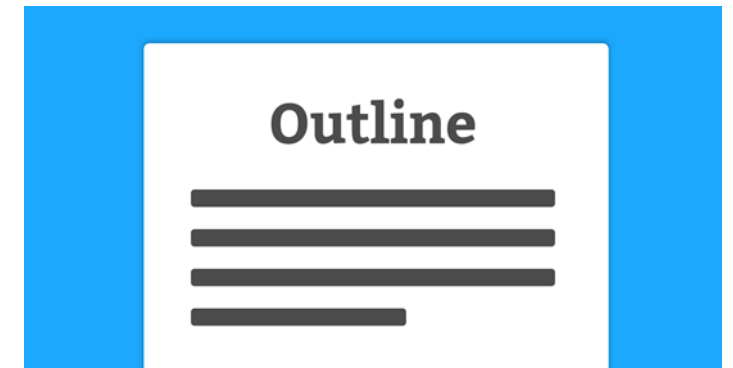
- Plain and straightforward language (avoid technical/legal jargon).
- Draws consumers' attention and in a readable format.
- Foreign languages if part of business practice to use other languages.
- Accessible to those with disabilities (how consumer can access in alternative format).
- Visible and accessible.
 - Online – Link on homepage.
 - Mobile application download page.
 - Offline – Printed forms or prominent signage directing consumers to web address.



Notices to Consumers

Roadmap for Privacy Policies

- ❑ Section 999.308(b) provides an outline of what needs to be included in a privacy policy:
 - ❑ Follow as a roadmap when preparing your privacy policy.
 - ❑ Disclose information regarding:
 - ❑ Right to Know About Personal Information Collected, Disclosed, or Sold.
 - ❑ Right to Request Deletion of Personal Information.
 - ❑ Right to Opt-Out of Sale of Personal Information.
 - ❑ Exemption from opt-out notice if you do not and will not sell personal information and disclose in your privacy policy.
 - ❑ Right to Non-Discrimination for Exercise of Consumer's Privacy Rights.
 - ❑ How Authorized Agents Can Submit Requests.
 - ❑ Contact Information for Questions.
 - ❑ Date Privacy Policy Updated.



Notices to Consumers

Practical Tips

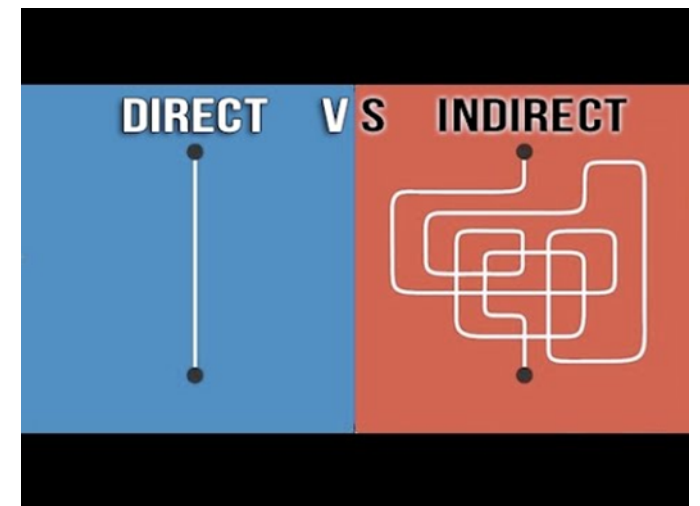
- ❑ How to draft privacy policy if you operate a multi-state or multi-national corporation?
 - ❑ Use simple and plain language to initially describe your company's information collection and sharing practices.
 - ❑ Include a separate section for California or other jurisdictions (e.g., other state laws or GDPR) after describing your company's general practices.



Notices to Consumers

Clarity Regarding Direct or Indirect Collection – Notice at Collection

- ❑ Ambiguous in text of CCPA if disclosure needed for indirect collection of personal information (e.g., not directly from the consumer, but from other sources).
- ❑ Section 998.305(d) clarifies that businesses do not need to provide notice under these circumstances unless they plan to sell the personal information.
- ❑ If business decides to sell the personal information it must:
 - ❑ (1) Contact consumer directly to provide notice of right to opt-out; OR
 - ❑ (2) Confirm if source of information provided opt-out notice and get signed attestation regarding same.



Business Practices for Handling Consumer Requests

- Two or more methods for consumers to submit requests to know, requests to delete, and requests to opt-out of sale.

- Request to Know & Request to Delete**
 - A toll-free number (e-mail okay per AB-1564 if online only).
 - If you operate a website, you need an interactive webform.
 - Other – designated email address, a form submitted in person, a form submitted through the mail.
 - Responding to such requests:
 - Confirm receipt within 10 days and provide information regarding how business will process request.
 - Respond within 45 days.
 - 45-day extension (90-day max) if you give notice to consumer and reason for extension.
 - Identity Theft Concerns:
 - Cannot verify identity – don't disclose or delete.
 - Don't disclose SSN, driver's license number, government-issued ID number, financial account number, health insurance or medical identification number, account number, security questions and answers.



Business Practices for Handling Consumer Requests

Opt-Out of Sale

- Need interactive webform accessible via a “Do Not Sell My Personal Information” or “Do Not Sell My Info” link.
- Other – toll-free number, a designated email address, a form submitted in person, a form submitted through the mail, and user-enabled privacy controls.
- Must act upon request within 15 days.
- Notify third parties who purchased personal information within 90 days and instruct not to further sell.

Business Practices for Handling Consumer Requests



Practical Tip

- ❑ Consider how you interact with consumers when determining methods.
- ❑ Example 1: If the business is an online retailer, at least one method by which the consumer may submit requests should be through the business's retail website.
- ❑ Example 2: If the business operates a website but primarily interacts with customers in person at a retail location, the business shall offer three methods to submit requests to know—a toll-free telephone number, an interactive webform accessible through the business's website, and a form that can be submitted in person at the retail location.

Business Practices for Handling Consumer Requests

Training and record-keeping requirements for businesses to demonstrate compliance

- ❑ Train employees on how to handle consumer requests.
- ❑ Maintain records of consumer requests and business's response for at least 24 months.
- ❑ Businesses that buy, receive, sell or share the personal information of 4 million or more consumers are also required to maintain detailed metrics regarding consumer requests and post these metrics on their website.



Business Practices for Handling Consumer Requests



Practical Tips

- Training and record keeping are very important.
- Document everything – procedures, the dates and how often you trained employees, the consumer requests and your response.
- Attorney General may be more forgiving if you implemented procedures and trained employees, but there was one incident where your business did not provide a timely or adequate response.
- Documentation is key to defending enforcement actions and lawsuits.
- Retain outside counsel to provide legal guidance and opinion – helps protect privilege.

Verification of Requests

- Match the identifying information provided by the consumer to the personal information the business maintains about the consumer.
- Best way is through consumer's password-protected account.
- If no password-protected account, two standards:
 - (A) Disclosure of categories of personal information need “reasonable degree of certainty,” i.e., two-data points provided by consumer.
 - (B) Disclosure of specific pieces of personal information need “reasonably high degree of certainty,” i.e., three-data points provided by consumer and signed declaration.
 - (C) Request to delete – could be either standard depending on sensitivity of personal information and risk of harm to consumer (e.g., family photos v. browsing history).
- Authorized Agents:
 - (1) Power of attorney; or
 - (2) Consumer provides authorized agent written permission and verify own identity with business.



Special Rules Regarding Minors

- ❑ For minors under 13 years of age, a business must use a reasonable method to confirm that the person affirmatively authorizing the sale of personal information about the child is the parent or guardian of the child.
 - ❑ (1) Consent form signed by parent or guardian under penalty of perjury and returned to business.
 - ❑ (2) Requiring a parent or guardian, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder.
 - ❑ (3) Call toll-free number.
 - ❑ (4) Video conference.
 - ❑ (5) In-person.
 - ❑ (6) Government-issued identification.

- ❑ Maintain a reasonable process for allowing minors between the ages of 13 and 16 to opt-in to the sale of their personal information.



Non-Discrimination

- ❑ A business cannot discriminate against a consumer for exercising his or her rights under the CCPA.
- ❑ However, a business may offer a price or service difference to a consumer if it is reasonably related to the value of the consumer's data.
- ❑ Eight different methods a business can use to estimate the value of the consumer's data. The focus is on the value to the business, not consumer.



Non-Discrimination



Practical Tips

What is discrimination?

- Example 1: A music streaming business offers a free service and 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 retail store offers discounted prices to consumers who sign up to be on their mailing list. If the consumer on the mailing list can continue to receive discounted prices even after they have made a request to know, request to delete, and/or request to opt-out, the differing price level is not discriminatory.

Document how you calculated the value of the consumer's data.

- Required by regulation and needed to defend enforcement action/lawsuit.
- This issue comes up in liquidated damages cases.

Initiative 19-0019, the California Privacy Rights and Enforcement Act of 2020 (CPREA)



History

- ❑ Real estate developer Alastair Mactaggart proposed original and broad California data privacy law for November 2018 ballot.
- ❑ Lobbyists, industry leaders, and legislators scrambled together and enacted CCPA on June 28, 2018 in response to remove ballot.
- ❑ Mactaggart unhappy with current state of CCPA and wants to broaden the rights for November 2020 voting on statewide ballot measure.
- ❑ Operative on January 1, 2021 if approved by voters.



Overview

- ❑ Right to ask business to correct inaccuracy.
- ❑ Right to tell business not to use sensitive personal information for advertising or marketing.
 - ❑ Sensitive personal information broad, e.g., SSN, ID numbers, account/financial information, precise geolocation, race, ethnicity, religion, union membership, biometric info, health, sexual orientation, etc...
- ❑ Sale of sensitive personal information requires opt-in consent.
- ❑ Disclose if information collected for political purposes.
- ❑ Disclose if business is profiling consumers for purposes of determining eligibility for services or products.
- ❑ Modifies definitions and other issues in CCPA.
- ❑ Develops a California Privacy Protection Agency.



Nevada's Data Protection Law (Senate Bill 220)



Nevada's Data Protection Law (Senate Bill 220)

- Signed into law by Nevada Governor Steve Sisolak May 30, 2019.
- Went into effect October 1, 2019.
- Amends existing law requiring operators of websites and online services to post privacy practices on website.

Nevada's Data Protection Law (Senate Bill 220)

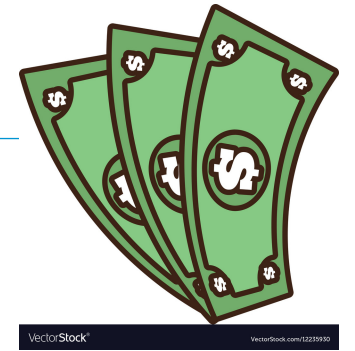


Who does it apply to?

❑ Applies to “Operators” which is defined as follows:

- ❑ Owns or operates an Internet website or online service for commercial purposes;
- ❑ Collects and maintains covered information from consumers who reside in this State and use or visit the Internet website or online service; and
- ❑ Purposefully directs its activities toward this State, consummates some transaction with this State or a resident thereof, purposefully avails itself of the privilege of conducting activities in this State or otherwise engages in any activity that constitutes sufficient nexus with this State to satisfy the requirements of the United States Constitution.

Nevada's Data Protection Law (Senate Bill 220)



What did the amendment add?

- ❑ Grants consumers the right to opt out of the sale of their personal information.
 - ❑ “‘Sale’ means the exchange of covered information **for monetary consideration** by the operator to a person for the person to license or sell the covered information to additional persons.”
 - ❑ Definition of sale more narrow and limited to transfer for monetary consideration, while CCPA defines sale for transfers “**for monetary or other valuable consideration.**”

Nevada's Data Protection Law (Senate Bill 220)

- ❑ Definition of consumer narrow under Nevada law.
 - ❑ “‘Consumer’ means a person who seeks or acquires, by purchase or lease, any good, service, money or credit for personal, family or household purposes from the Internet website or online service of an operator.”
 - ❑ Consumer under the CCPA simply means California resident.

Nevada's Data Protection Law (Senate Bill 220)

Definition of personal information also narrow

- ❑ “Personal information” means a natural person’s first name or first initial and last name in combination with any one or more of the following data elements, when the name and data elements are not encrypted:
 - (a) Social security number.
 - (b) Driver’s license number, driver authorization card number or identification card number.
 - (c) Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person’s financial account.
 - (d) A medical identification number or a health insurance identification number.
 - (e) A user name, unique identifier or electronic mail address in combination with a password, access code or security question and answer that would permit access to an online account.
- ❑ The term does not include the last four digits of a social security number, the last four digits of a driver’s license number, the last four digits of a driver authorization card number or the last four digits of an identification card number or publicly available information that is lawfully made available to the general public from federal, state or local governmental records.

Nevada's Data Protection Law (Senate Bill 220)

- ❑ Definition of personal information under CCPA broader.
 - ❑ “‘Personal information’ means 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. . . .”

Nevada's Data Protection Law (Senate Bill 220)

Practical Tips

- ❑ If you do business in California and Nevada, compliance with CCPA will help you leverage compliance with Nevada's law.
- ❑ Focus on the most comprehensive data privacy law if you are a multi-state or multi-national corporation.



Knobbe Martens

Questions?

Arsen Kourinian

Arsen.Kourinian@knobbe.com