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CALIFORNIA'S CONSUMER PRIVACY ACT FACES POSSIBLE REVISION AS ENFORCEMENT DEADLINE LOOMS

Rebecca Garcia, News Editor

In June 2018, California lawmakers passed a historic privacy bill that gave residents more control over the information that companies and businesses collect about them.¹ With no federal privacy law currently in place, the California Consumer Privacy Act (CCPA) is slated to become an example for other states seeking to enact their own privacy laws. While the law already has national implications, it appears that its impact will only increase in the coming years. California Attorney General, Xavier Becerra, is currently drafting regulations to provide more insight into compliance expectations and to ease feelings of uncertainty that have surrounded the Act's enactment.² Further, while the proposed regulations are not finalized, the CCPA itself could be overhauled by a new, tougher privacy law in the next year.³ Whether or not that ballot initiative is successful, the CCPA is paving the way for greater consumer protections.

In California, the power to introduce legislation is not just limited to politicians.⁴ Residents can propose new laws and amendments and, if they collect enough signatures, they can secure a

¹ Issie Lapowsky, *California Unanimously Passes Historic Privacy Bill*, WIRED (June 28, 2018), <https://www.wired.com/story/california-unanimously-passes-historic-privacy-bill/>.

² See Allison Grande, *4 Takeaways From Calif.'s Revised Consumer Privacy Regs*, LAW360 (Feb. 13, 2020), <https://www-law360-com.flagship.luc.edu/consumerprotection/articles/1242579/4-takeaways-from-calif-s-revised-consumer-privacy-regs>.

³ Gretchen Ramos & Darren Abernethy, *Ballot Initiative Could Bring Big Changes To Calif. Privacy Law*, LAW360 (Feb. 13, 2020), <https://www-law360-com.flagship.luc.edu/consumerprotection/articles/1243505/ballot-initiative-could-bring-big-changes-to-calif-privacy-law>.

⁴ Kristen J. Mathews & Courtney M. Bowman, *The California Consumer Privacy Act of 2018*, PRIVACY LAW BLOG (July 13, 2018), <https://privacylaw.proskauer.com/2018/07/articles/data-privacy-laws/the-california-consumer-privacy-act-of-2018/>.

statewide vote on their initiative.⁵ After speaking to a Google engineer and discovering how much data Google collects on its users, Alastair Mactaggart, a political novice, spent nearly \$3.5 million to place a privacy initiative on California's November 2018 ballot.⁶ However, knowing that enacted ballot initiatives can only be amended by future ballot initiatives and not legislation,⁷ lawmakers made a deal with Mactaggart in which he would withdraw the initiative with the condition that the lawmakers would quickly draft and pass a bill with the same protections.⁸ As a result, the California Consumer Privacy Act was signed by Governor Brown on June 29, 2018.⁹ In doing so, California passed the most comprehensive privacy bill in the country and continued a growing push for greater consumer protections.¹⁰

To fully understand the effect that the CCPA will have, it is essential to first understand the problem that consumer advocates aim to address with this bill. While the bill applies to tech giants such as Google and Microsoft, it is not intended to protect consumers only from those large players. The bill generally intends to protect all consumers from companies who track consumer behavior and proceed to sell that information for a profit.¹¹ For example, when consumers visit a website for a company that does much of their business online, it is more likely than not that that website is tracking the consumer's behavior, as almost every website on the internet today does.¹² The website uses "cookies" to track how long a consumer remains on the website as well as which articles they read and for how long.¹³ That information can then be used to make website improvements or it can be sold to third parties who buy similar information from other websites or

⁵ *Id.*

⁶ Morning Edition, *California Passes Strict Internet Privacy Law With Implications For The Country*, NPR (June 29, 2018), <https://www.npr.org/2018/06/29/624336039/california-passes-strict-internet-privacy-law-with-implications-for-the-country>.

⁷ Mathews & Bowman, *supra* note 4.

⁸ See Morning Edition, *supra* note 6.

⁹ Mathews & Bowman, *supra* note 4.

¹⁰ Lapowsky, *supra* note 1.

¹¹ Gilad Edelman, *California's Privacy Law Goes Into Effect Today. Now What?*, WIRED (Jan. 1, 2020), <https://www.wired.com/story/ccpa-guide-california-privacy-law-takes-effect/>.

¹² *Id.*

¹³ *Id.*

companies. Those third parties then combine all of the information they collect to create user profiles that advertisers can specifically target, which results in the same advertisement appearing on website after website.¹⁴ The goal of the CCPA is to ultimately give consumers a say about what websites can and cannot do with the data that is collected about consumers.¹⁵ If the consumer has the choice to limit what type of information a website can sell, the consumer can limit the information that reaches the hands of third parties who target them based on their behavior.

Generally, the CCPA creates new consumer rights relating to “the access to, deletion of, and sharing of personal information that is collected by businesses.”¹⁶ More specifically, the Act grants consumers four main new rights: (1) the right to know, (2) the right to delete, (3) the right to opt out, and (4) the right to non-discrimination.¹⁷ Businesses must now treat personal information as information that is owned by and controlled by the consumer rather than by the business.¹⁸ The right to know includes knowing what personal information is collected, used, shared, or sold by a company. This also includes knowing the category of information that might be disclosed as well as the specific information that is actually disclosed.¹⁹ The right to delete means that a consumer should be able to delete any of their personal information that is held by a business and, by extension, a business’ service provider.²⁰ The right to opt out means that consumers are able to demand that a business selling personal information stop selling that information.²¹ However, children under the age of 16 must specifically

¹⁴ *Id.*

¹⁵ Natasha Singer, *What Does California’s New Data Privacy Law Mean? Nobody Agrees*, NY TIMES (Dec. 29, 2019), <https://www.nytimes.com/2019/12/29/technology/california-privacy-law.html>.

¹⁶ Office of the Attorney General, *California Consumer Privacy Act (CCPA)*, XAVIER BECERRA ATTORNEY GENERAL, <https://oag.ca.gov/privacy/ccpa> [hereinafter Attorney General Background].

¹⁷ Office of the Attorney General, *California Consumer Privacy Act (CCPA)*, XAVIER BECERRA ATTORNEY GENERAL, https://oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf [hereinafter Attorney General Fact Sheet].

¹⁸ Singer, *supra* note 15.

¹⁹ Cal. Civ. Code §1798.

²⁰ Cal. Civ. Code §1798.

²¹ Cal. Civ. Code §1798.

opt in, rather than opt out, in order for the business to be able to sell their information. Similarly, those under the age of 13 must have a parent or guardian opt in for them.²² Finally, the right to non-discrimination means that a business cannot punish a consumer for their decision to opt-out.²³ The business cannot alter terms of price or service for a consumer simply because the consumer has chosen to exercise one of their privacy rights under the CCPA.

While the CCPA does provide consumers with key protections, it does not apply in every context, as it only applies to specific businesses. A business is subject to the CCPA if (1) it has gross annual revenues in excess of \$25 million; or (2) it buys, receives, or sells the personal information of 50,000 or more consumers, households, or devices; or (3) it derives 50 percent or more of its annual revenues from selling consumers' personal information.²⁴ The second provision applies whether the business sells the personal information for money or other compensation.²⁵ Additionally, businesses that handle the personal information of a certain number of consumers (to be determined by the California Attorney General during the regulation drafting process) will have other obligations as well.²⁶

In those contexts where it does apply, the CCPA imposes new obligations on businesses.²⁷ Businesses subject to the CCPA must now provide notice to consumers that their data is being collected either at the time of collection or before it is collected.²⁸ Businesses must also create specific procedures for responding to consumers who choose to exercise their right to opt out or to delete personal information. Businesses must respond to consumer requests in a timely fashion and must verify the identity of the consumer before disclosing any information.²⁹ Some of these requirements of the CCPA are so novel that companies disagree about how to comply with them.³⁰ As a result, when the CCPA went into effect on January 1, 2020, companies rolled out various different

²² Cal. Civ. Code §1798.

²³ Cal. Civ. Code §1798.

²⁴ Cal. Civ. Code §1798.140.

²⁵ Singer, *supra* note 15.

²⁶ Attorney General Fact Sheet, *supra* note 17.

²⁷ *See id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Singer, *supra* note 15.

policies.³¹ For example, Evite, an online invitation service, has given consumers the opportunity to opt out if they do not want their information shared with third parties, while Indeed, a job search engine, has stated that consumers who opt out will be asked to delete their accounts.³²

The law may have gone into effect on January 1, 2020, but it is far from complete, as the Attorney General has not yet issued the final regulations that will clarify and operationalize the CCPA.³³ The Attorney General's power to enforce the law is delayed until either July 1 or six months after the final regulations are issued, whichever comes first.³⁴ On October 10, 2019, the Attorney General released the first set of draft regulations. This was followed by a comment period during which consumers and businesses could review the regulations and give feedback. Once the comment period closed in December 2019, the Attorney General had the option to revise the regulations and subsequently open a new comment period.³⁵ Attorney General Becerra did just that, releasing the Revised Proposed Regulations on February 10, 2020 and opening another fifteen-day comment period scheduled to end on February 25, 2020.³⁶ Attorney General Becerra's revisions to California's proposed consumer privacy regulations provided further insight into his compliance expectations and addressed several of the changes requested by businesses, including that service providers be allowed to use consumer data for internal purposes.³⁷ However, the revisions failed to address some key issues that were raised in the first round of comments, such as whether consumers will be able to opt out of targeted advertising altogether.³⁸ While the revisions were a mixed bag for businesses and consumers, Attorney General Becerra has stood up to pressure from the business

³¹ *See id.*

³² *Id.*

³³ Attorney General Fact Sheet, *supra* note 17.

³⁴ Allison Grande, *Calif. Voters May Get Chance to Tighten Privacy Law*, LAW360 (Sept. 25, 2019), <https://www-law360-com.flagship.luc.edu/articles/1202779/calif-voters-may-get-chance-to-tighten-privacy-law>.

³⁵ Attorney General Fact Sheet, *supra* note 17.

³⁶ Attorney General Background, *supra* note 16.

³⁷ Allison Grande, *4 Takeaways From Calif.'s Revised Consumer Privacy Regs*, LAW360 (Feb. 13, 2020), <https://www-law360-com.flagship.luc.edu/consumerprotection/articles/1242579/4-takeaways-from-calif-s-revised-consumer-privacy-regs>.

³⁸ *Id.*

industry and has not backed down from his pro-consumer approach to these regulations.³⁹

Despite the fact that the CCPA cannot yet be enforced and has yet to see the release of a complete set of regulations, it has already had a nation-wide effect on consumers. The California law spurred a national conversation about consumer privacy, but while many in Congress seem to support the idea, no federal privacy law has been passed.⁴⁰ In the absence of federal law, other states are looking to the California law as an example.⁴¹ Until a federal law is passed, the California law will continue to serve as a model for other states, given its tough standards for businesses and strong consumer protections. It is also possible that the toughest data privacy law in the country will become even tougher in the coming year.⁴² Mactaggart has submitted another ballot measure, now titled the California Privacy Rights Act, for the November 2020 election.⁴³ This Act would raise the already high bar set by the CCPA and create a new independent enforcer of the bill, the California Privacy Protection Agency, to replace the Attorney General.⁴⁴ Given that Mactaggart would have had the support necessary to take his first ballot initiative to a November 2018 vote, it appears that Californians will have the opportunity to vote to strengthen their state privacy law come November 2020. The implications of such a potential vote could be far greater than they seem, as creating a higher standard in California could mean that any federal bill that is passed in the future would need to be just as strong.

³⁹ *See id.*

⁴⁰ *See* Amanda Lawrence, Sasha Leonhardt & David Rivera, *State Privacy Law Initiatives To Prepare For In 2020*, LAW360 (Feb. 6, 2020), <https://www-law360-com.flagship.luc.edu/articles/1241213/state-privacy-law-initiatives-to-prepare-for-in-2020>.

⁴¹ *Id.*

⁴² *Activist Aims To Strengthen California's Consumer Privacy Act*, NPR (Feb. 20, 2020), <https://www.npr.org/2020/02/20/807665113/activist-aims-to-strengthen-californias-consumer-privacy-act>.

⁴³ Ramos & Abernethy, *supra* note 3.

⁴⁴ *Id.*