

National Reverse Mortgage Lenders Association

Western Regional Meeting

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California Consumer Privacy Act

What is it?

How to Prepare?

What is Next?

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Agenda

- Brief Reminder and Overview of Federal Privacy Rules and Trends in Privacy Regulations
 - GLBA
 - FCRA
 - GDPR
- Deep Dive - California Consumer Privacy Act
- Other States' Recent Actions on Consumer Privacy



Overriding Concerns

(and what you should be thinking about in your operations)

- Where / how do you obtain information? (Directly from consumers, or other sources? – use of vendors)
- What do you do with the information?
- Do you tell your customers what you will do with their information?
- Do you follow what you tell your customers?
- How do you protect your customers information?
- Do you have a plan if you get breached?



Privacy

- In 1972, California voters amended the California constitution to include the right of privacy among the “inalienable” rights of all people.
- The California Constitution, Article 1, Section 1:
 - “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy**.”



Privacy

- More Than Data Breaches
- Various California Laws
 - See, www.oag.ca.gov/privacy/privacy-laws
 - Constitutional Right to Privacy
 - General Privacy Laws
 - Health Information Privacy
 - Identity Theft
 - Online Privacy
 - Unsolicited Commercial Communications
 - Federal Laws
- Recognizes Rise of New Technologies and Industries



Overview

- 2016 – Cambridge Analytica
 - Harvested data from Facebook users for campaigns
 - Ted Cruz and Donald Trump
 - Brexit
- Privacy Law – Constitutions of 10 states
- California personal information
 - Name, SS, Physical Address, Identifying (contact) Information
- 2017 – The Cocktail Party
 - Alastair Mactaggart - \$3,000,000 personal campaign
- 9-01-17 – Initiative 17-0027
- 10-12-17 – Initiative 17-0039 (qualified 6-25-18)



Overview

- AB 375 proposed and negotiated June 21, 2018
- Enrolled June 28, 2018
- Proposition withdrawn on June 28, 2018
- Adds Title 1.18.5, Civil Code sections 1798.100 *et seq.*, effective January 1, 2020
- Enormous ambiguity and legal issues
- Attorney General to Prepare Regulations
- SB 1121 enrolled September 7, 2018



Influencing Factors

- GDPR's Right to Be Forgotten
- GDPR's Heightened Transparency Requirements
- Portability of Data
- Other California Privacy Laws
- Concerns with Data Breaches
- Expanded Definition of Privacy
- Attorney General's Concerns



Attorney General's Letter 8-22-18

- Provide opinions to any business or third party
 - (Not addressed)
- Civil penalties (which modify UCL) unconstitutional
 - (Not fully addressed)
- Pre-filing notice of civil lawsuits to AG
 - (Removed)
- Rulemaking within one year
 - (Extended)
- Private Right of Action
 - (Not addressed)



Five Protected Privacy Rights

Right of Californians to:

1. Know what personal information is being collected about them.
2. Know whether their personal information is sold or disclosed and to whom.
3. Right to be forgotten and say “no” to the sale of personal information.
4. Access their personal information.
5. Equal service and price, even if they exercise their privacy rights.



Know What Personal Information Is Being Collected

- Disclosures before information is collected
- Consumer can require covered business to disclose
 - What information is collected
 - Categories
 - Specific information
 - What information is maintained
 - What information is sold
 - What information is transferred
- No charge to consumer



Whether Personal Information Is Sold Or Disclosed And To Whom

- Verifiable consumer request
 - Categories of Information Collected
 - Categories of sources from which Information is collected
 - Business or Commercial Purpose for Collecting or Selling Information
 - Categories of third parties with whom information is shared
 - Specific items of Personal Information collected



Right to be Forgotten & to say “No” to Sale of Personal Information

- Right to be forgotten
 - Delete personal information
 - Held by company
 - Held by service providers
- Right to opt out of sale
 - Cease selling personal information
 - Link: “Do Not Sell My Personal Information”
- Disclosure of these rights
- Radical departure from current U.S. privacy norms



Access Personal Information

- “Give it to me”
- Verifiable consumer request
 - Obtain copies of information
 - In readable form
 - In transferrable form
- Collected or Stored in Last 12 Months
- Semi-Annual Requests
- Make it easy for Consumer



Equal Service and Price Even if Exercise Privacy Rights

- Prohibits
 - Refusing to serve customer
 - Different prices
 - Imposing penalties
 - Providing different level of products or services
- But may offer a different price, rate, level of service or quality of product or service if differences are “related to the value provided to the consumer by the consumer’s data.”
 - What does this mean?



Coverage

- Three coverage definitions—
 - “Consumer”
 - “Business”
 - “Personal Information”



Consumer

- **Consumer** means a **natural person who is a California resident**
 - Regardless how the individual is identified
 - Includes unique identifiers
 - Includes household (extended family members) information pertaining to the consumer such as utility bills
- To be construed *broadly*



Business

- Very Broad “**Business**” definition
- A For-Profit legal entity that collects (or uses) consumer’s personal information and exceeds a specific threshold
- Entity that controls a Business and shares a common brand – subsidiaries or affiliates
- Business purpose is very broad - everything
- California Based? Or U.S. Based? Or Globally Based?



Business - Thresholds

- A. Has annual gross revenues in excess of \$25,000,000
- B. Alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices
- C. Derives 50% or more of its annual revenues from selling consumers' personal information.



Personal Information

- “**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. Some examples:
- (A) **Identifiers** such as a real name,
 - alias,
 - postal address,
 - unique personal identifier,
 - online identifier Internet Protocol address,
 - email address,
 - account name,
 - social security number,
 - driver’s license number,
 - passport number,
 - or other similar identifiers.



Personal Information

- (B) Any categories of personal information described in subdivision (e) of Section 1798.80: (“any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver’s license or state identification card number, insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information”).



Personal Information

- (C) Characteristics of **protected classifications** under California or federal law.
- (D) **Commercial information**, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.
- (E) **Biometric** information.
- (F) **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 Web site, application, or advertisement.
- (G) **Geolocation data**.



Personal Information

- (H) Audio, electronic, visual, thermal, olfactory, or similar information.
- (I) Professional or employment-related information.
- (J) Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g, 34 C.F.R. Part 99).
- (K) Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.
- Not publicly available information



Delivery of Personal Information to Consumer

- A consumer shall have the right to request that a business that collects a consumer's personal information disclose to that consumer the categories and specific pieces of personal information the business has collected.
- Business shall provide information to consumer upon receipt of verifiable consumer request, promptly and at no charge.
- At or before the point of collection, a business shall inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used.



Deletion of Consumer Information

- *“Right to be forgotten”*
- Consumer has a right to request that the Business delete personal information
- Business shall disclose to consumer the right to request that personal information be deleted
- If verifiable request to delete information, the business shall delete the information, and direct its service providers to delete the personal information
- Business responsible for its service providers



Exceptions to Deleting Information

Not Required to Delete Personal Information:

1. Complete the transaction or contract for which the personal information was collected.
2. Detect security incidents, or illegal activity; or prosecute those responsible for that activity.
3. Debug to identify and repair errors that impair existing intended functionality.
4. Exercise free speech, ensure the consumer's right to exercise free speech, or other legal right.
5. Comply with the California Electronic Communications Privacy Act.
6. Engage in public or peer-reviewed scientific, historical, or statistical research.
7. To enable solely internal uses that are reasonably aligned with the expectations of the consumer based on the consumer's relationship with the business.
8. Comply with a legal obligation.
9. Use the consumer's personal information, internally, in a lawful manner that is compatible with the context in which the consumer provided the information.



Consumer Has Right to Request

1. The categories of personal information it has collected about that consumer.
2. The categories of sources from which the personal information is collected.
3. The business or commercial purpose for collecting or selling personal information.
4. The categories of third parties with whom the business shares personal information.
5. The specific pieces of personal information it has collected about that consumer.



If Sell or Disclose, Consumer May Request

1. The categories of personal information that the business collected about the consumer.
2. The categories of personal information that the business sold about the consumer and the categories of third parties to whom the personal information was sold, by category or categories of personal information for each third party to whom the personal information was sold.
3. The categories of personal information that the business disclosed about the consumer for a business purpose.



Consumer May Request No Disclosure

- Right to Opt Out
- Business that sells or discloses consumer information must provide consumer a right to opt out.
- If opt out, may not disclose information.
- Consumer may later opt in.
- If known age is 13-16, minor or parent must opt in.
- If known age is 12 or less, parent must opt in.



Non-Discrimination

- Right to non-discrimination in access, equal service, and price, if consumer exercises right to privacy
 - Refusing to conduct business with the consumer
 - Charging different prices or imposing penalties, or
 - Providing a different level of products or services
 - Suggesting different price and quality
- But, a covered business may offer a different price, rate, level of service or quality of product or service if the differences are “related to the value provided to the consumer by the consumer’s data.”
- Beware of UDAAP Claims




Compliance

- Provide two or more methods to request information
 - Toll-free telephone number
 - Web access
 - Other
- Provide information within 45 days, free to consumer
 - Categories
 - Specific Information
- Identify information collected or sold in the last 12 months
- Two requests per year
- Produce information in a portable form, if technically feasible
- Disclose and update privacy policy every 12 months
- Review vendor and third-party contracts and compliance



Do Not Sell

- Clear and conspicuous link on Business' home page
 - Or on California Consumer Home Page
- Provide description of consumer's rights
- Train employees
- Refrain from selling information if consumer opts out
- Do not solicit opt in for 12 months
- Sell – Sell, rent, release, disclose, disseminate, make available, transfer, or otherwise communicate
- “Do Not Sell My Personal Information” on Homepage
- May not require consumers to create an account




Definitions (§ 1798.140)

- Aggregate consumer information
- Biometric information
- Business
- Business purpose
- Collects, collected, collection
- Commercial purpose
- Consumer
- Deidentified
- Designated methods for submitting requests
- Device
- Health insurance information
- Homepage
- Infer or inference
- Person
- Personal information
- Probabilistic identifier
- Processing
- Pseudonymize or pseudonymization
- Research
- Sell, selling, sale, or sold
- Service or services
- Service provider
- Third party
- Unique identifier
- Verifiable consumer request



Application of CCPA to Employers

- Broad definition of “consumer” includes:
 - Applicants
 - Full time or part time employees
 - Temporary workers
 - Interns
 - Volunteers
 - Independent contractors
 - Even dependents and beneficiaries of the above



Personal Information – Employment Context

- Employee's personnel file
- Resume / application / CV
- Employment contract
- Tax documents
- Medical history
- Residence history
- Performance evaluations
- Personality test
- Internet search history
- Interactions with websites
- Images of employees (security cameras, ID badge, marketing, website)
- Geolocation data
- Biometric data (timekeeping or property access)
- Background search results



Exempt Data

- Medical data covered by the following are not covered by the CCPA:
 - Confidentiality of Medical Information Act (CMIA)
 - FMLA, ADA accommodation, worker's compensation claims
 - Health Ins. Portability and Accountability Act of 1996 (HIPAA) / Health Information Technology for Economic and Clinical Health Act (HITECH)
 - Medical plans, dental plans, flex spending
 - Benefits covered by ERISA (preemption)



Disclosure Requirements

- Cal. Labor Code section 1198.5
 - Must provide current and former employees with copies of personnel file.
- Data encompassed under the CCPA is broader
- What data is sold / disclosed to third parties?
 - Ex: payroll processing services
- Include employee rights in the employee handbook



Deletion Requests

- Exception to deletion:
 - Personnel records for 3 years (Cal. Labor Code section 1198.5)
 - Payroll records for 3 years (Cal. Labor Code section 226)
 - Data that is necessary for the “transaction” i.e. employment of that person
 - Data collected, processed, or retained under Fair Labor Standards Act (FLSA)
- Who will handle these requests?
- No discrimination allowed



Can employees waive CCPA rights?

- NO!!!
 - The CCPA prohibits a contractual waiver or limitation of rights.



The Act Does Not Restrict Business's Ability To:

1. Comply with federal, state, or local laws.
2. Comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons by federal, state, or local authorities.
3. Cooperate with law enforcement agencies concerning conduct or activity that the business, service provider, or third party reasonably and in good faith believes may violate federal, state, or local law.
4. Exercise or defend legal claims.
5. Collect, use, retain, sell, or disclose consumer information that is deidentified or in the aggregate consumer information.
6. Collect or sell a consumer's personal information if every aspect of that commercial conduct takes place wholly outside of California.



Exceptions to Coverage

- May not violate California evidentiary privilege
- Does not apply to protect health information
- Does not apply to providing information to a CRA in a credit report
- Does not apply to Gramm-Leach-Bliley Act
- Does not apply to Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721 *et seq.*
- Business may not be responsible for service provider



Exceptions to Coverage

- May comply with federal, state and local laws
- Does not apply if conflicts with California or United States Constitutions
- Does not apply if infringes on noncommercial activities (newspapers and periodicals)
- Does not apply to Graham Leach Bliley collected information
- Does not apply to Financial Information Privacy Act collected information
- Expanded exceptions for medical information



GLB Exception

- Section 1798.145: The obligations imposed on businesses by the CCPA shall not restrict a business's ability to conduct business.
- Exception: The CCPA “shall not apply to personal information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act . . . and implementing regulations. Civ. Code, §1798.145(e).
- Exception to the Exception: Unauthorized access and exfiltration, theft, or disclosure of nonencrypted or nonredacted personal information due to failure to implement and maintain reasonable security procedures and practices. Civ. Code, §1798.150(a)(1).



Enforcement

- Attorney General Action – if fail to cure in 30 days
 - \$2,500 per violation, plus injunction
 - \$7,500 per intentional violation
- 100% Funds Consumer Privacy Fund
- May seek Attorney General’s opinion and guidance
- No enforcement actions until earlier of July 1, 2020, or six months after publication of final regulations
- CCPA preempts local law
- Business or third party may seek opinion of AG for guidance on how to comply with CCPA



Private Right of Action

- Data Breach only
 - Individual or Class-Action
 - Non-encrypted or non-redacted personal information
 - Unauthorized access and exfiltration, theft, or disclosure
 - Failure to implement and maintain reasonable security procedures and practices
- Penalties: \$100-\$750 per consumer per incident, injunction, other relief
- AG pre-screening and 30-day notice to cure
- Attorney General recommended
 - Private Right of Action as a Consumer Remedy



Implementation

- On or before July 1, 2020, Attorney General to solicit public participation to adopt regulations
- Consumer waivers are void and against public policy
- Title to be liberally construed
- Supplements federal and state law
- Supersedes local and municipal laws
- Operative January 1, 2020



Preemption

- Field preemption
 - Unlikely – no federal law of privacy
 - Many state laws on privacy
- Conflict preemption
 - Likely - Carve-outs in act, but limited



California Attorney General

- Attorney General Regulation – Listening Tour
 - Fresno, Los Angeles, Sacramento, Riverside, San Diego, San Francisco, Stanford
- Privacy Enforcement and Protection Unit
- Comments were due March 8, 2019
- Proposed Regulations
- Comments
- Final Regulations due July 1, 2020



AG - Areas for Rulemaking

- Categories of personal information
- Definition of Unique Identifiers
- Exceptions to CCPA
- Submitting and Complying with Requests
- Uniform Opt-Out Logo/Button
- Notices and Information to Consumer, including Financial Incentive Offerings
- Verification of Customers' Requests



Legislative Action

- 19 Bills
 - One introduced December 2018
 - Fifteen introduced February 20-22, 2019
 - Three amended March 19, 2019
- New Titles Added (3)
- New Topics Added (4)
- Sections Revised (9)
- Overall Revisions to the Act (3)



Legislative Process

- 40 Senators and 80 Assembly Members
- Idea to Legislative Counsel
- Bill returned to Author, and Introduced
- Introduced, read (bill number, author, descriptive title), printed, 30-day hold
- Committee hearings (Rules, Policy, Fiscal)
- Bill analysis (current law, bill intent, background, support)
- Second reading, Analysis, Third reading
- Vote – if immediate or appropriations 27/54, if not 21/41
- Repeat in other house, Resolution of Differences
- Governor (Signed, Not Signed, Veto and Override)
- Chaptered/Enrolled



New Titles in Civil Code

- AB 1202 – Chau – 1.81.48 (CC 1798.99.80) - Intro
 - Data brokers to register and provide information to AG
 - Does not supersede or interfere with CCPA
- AB 1281 – Chau – 1.81.7 (CC 1798.300) - Intro
 - Disclosure of use of facial recognition technology
- AB 288 – Cunningham – 1.81.24 (CC 1798.90.7) - Amend
 - If consumer deletes account, may request social networking service to delete and not sell information



New Topics in Civil Code

- AB 846 – Burke, Low, Mullin - Intro
 - Consumer Loyalty Programs
- AB 1138 – Gallagher - Intro
 - Social media website/application may not create account for person under 16 without permission of parent or guardian
- AB 981 – Daly - Intro
 - Additional Exemptions to the CCPA for the Insurance and Information and Privacy Protection Act
- AB 161 – Ting - Amend
 - Electronic credit card receipts beginning 1/01/22



Civil Code Sections Revised

- AB 1758 – Chau – 1798.100 – Intro
 - Not required to retain single use information - non-substantive changes
- AB 1760 – Wicks – 1798.105 – Intro
 - Right to request a business delete personal information – non-substantive changes
- AB 752 – Stern – 1798.125 – Intro
 - Non-discrimination provision - non-substantive changes



Civil Code Sections Revised

- AB 1564 – Berman – 1798.130 - Intro
 - Consumer may request information from business from toll-free number or email address, and website address, if available
- AB 753 – Stern – 1798.135 – Intro
 - Do Not Sell Link on internet web - non-substantive changes
- AB 1355 – Chau – 1798.140 - Intro
 - Exclude consumer information that is deidentified or aggregate consumer information from the definition of personal information



Civil Code Sections Revised

- AB 1146 – Berman – 1798.145 – Intro
 - Exempts certain vehicle information related to warranty work or recall
- AB 1416 – Cooley – 1798.145 - Intro
 - Business may use consumer's personal information
- SB 561 – Jackson – 1798.150, 1798.155 – Intro
 - Adds private right of action, statutory damages \$100-\$750 or actual damages, injunctive or declaratory relief, other relief, removes 30-day right to cure, no AG guidance but may publish materials and guidance.



Revisions to CCPA

- AB 25 – Chau – An act relating to consumer privacy
- AB 873 – Irwin – An act relating to consumer privacy
- AB 874 – Irwin – An act relating to consumer privacy

- SECTION 1. It is the intent of the Legislature to enact legislation relating to the California Consumer Privacy Act of 2018.



Other States Following Right Behind

- **Washington (SB 5376):** Moving fast. Gives consumers the right to disclosure of data collected and sold / disclosed. Requires companies to allow consumers to correct inaccurate PI, delete PI, and object to PI being used in direct marketing. The bill would also put new regulations on companies developing facial recognition software.
- **Hawaii (SB 418):** Potentially broader because it does not define a business, thus extending applicability to all businesses operating in Hawaii. Does not specify any penalties and does not include a private right of action.
- **Massachusetts (SD 341):** Copies much of the CCPA but with fewer exceptions re deletion requests. Allows private right of action for any violation.
- **Rhode Island (So234):** Inspired by the CCPA but no role for the RI AG for rulemaking or enforcement (i.e. no further clarification on statutory language).
- **New York (So0224):** Similar to California's Shine the Light Law. Requires transparency re disclosure of PI to third parties for marketing purposes. Service providers are excluded from definition of third parties.
- **North Dakota (HB 1485):** Only one substantive requirement: no disclosure of PI without the "express written consent." No sharing with service providers without this consent.
- **Maryland (SBo613):** Very similar to CCPA. The deletion right covers any maintained as opposed to provided PI. No business usage exception. No private right of action.
- **New Mexico (SB 176):** Similar to the CCPA, but more clearly structured. The bill includes significant rulemaking by the NM AG.
- **Mississippi (HB 2153):** (did not pass)



What Can You Do NOW?

- Monitor legislature and Attorney General's actions
- Identify categories of personal information collected, stored, used, shared or sold
- Identify and map specific personal information collected
- Collection, repository, transfer
- Determine use of personal information
- Prepare disclosures to consumers
- Prepare privacy notice
- Update website – prepare separate California page
- “Do Not Sell My Personal Information”



What Can You Do NOW?

- Prepare access for consumers
- Toll-free number, web-access, other
- Prepare response to consumer requests – access and produce
- Prepare opt-out mechanism
- De-identify Personal Information
- Work with Vendors
- Begin storing and mapping data
- Update privacy policies and customer service tools
- Contractual relations with vendors and third-parties
- Testing, verification, training, and monitoring



Future Fixes

- Numerous ambiguities
- Consumer
 - Resident
 - Out-of-state?
 - No limit on purpose information collected
 - Commercial purpose?
 - Consumer purpose?
 - Household Information
- Business
 - Parent organization and all subsidiaries?
 - Independently operating subsidiaries?
 - \$25,000,000 – from where? California? U.S.? Global?



Future Fixes

- Notices
 - Forms
 - Language
- Effective Date
 - January 1, 2020
 - Begin collecting information and disclose
 - Begin disclosing information collected year earlier?
- Attorney General Regulations
 - Due July 1, 2020, six months *after* effective date



Future Fixes

- No discrimination
 - Differential Pricing
 - Benefit consumers
- Home page issues
 - “Do Not Sell My Personal Information”
 - California Specific Page
 - Help for Homeowners
- Civil Liability
 - Expansion
- Overlapping federal and state laws
- Will Congress Act



What Else

- Law in California
- Other states are considering similar laws
- National Conference of State Legislatures
 - Data Security Laws – Private Sector
 - 25 identified: <http://www.ncsl.org/research/telecommunications-and-information-technology/data-security-laws.aspx>
- Federal action



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