

KIRKLAND ALERT

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California's New Privacy Law Represents a Sea Change for Consumer Rights in the United States

Beginning on January 1, 2020, the California Consumer Privacy Act of 2018 (the "CCPA") will go into effect. This bill, signed into law on June 28, 2018, is perhaps the strongest data privacy bill passed in the U.S. to date, and it will impose significant legal obligations on certain businesses that are involved in collecting or selling personal information of California residents. The CCPA appears to have been heavily influenced by the EU's recently implemented General Data Protection Regulation (the "GDPR"), and contains a number of similar provisions.

What Businesses Are Affected?

For a business to fall under the remit of the CCPA, it must be for profit, collect "personal information" (defined under the CCPA — see below) about California consumers, and do business in California.

Additionally, to be covered under the CCPA a business must either (1) have gross revenue in excess of \$25,000,000, (2) annually buy, sell, or share the data of over 50,000 consumers, or (3) derive over 50 percent of its revenue from selling consumers' personal information.

Any entity controlled by, controlling, or under common control with an otherwise covered business that shares common branding (i.e., a shared name or trademark) is also subject to the CCPA.

What Personal Information is Protected?

The CCPA defines "personal information" fairly broadly as any information that identifies, relates to, or is capable of being associated with, or could reasonably be linked, directly or indirectly, with a consumer. Accordingly, personal information includes an individual's name, address, social security number, and banking information, but also internet browsing history, commercial purchasing history, employment and educational information.

Furthermore, the law protects "[i]nferences 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, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes" — in other words, customer profiles of the kind that many companies create for each of their customers.

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Important Provisions of the CCPA

Generally speaking, the CCPA provides consumers with rights to request what personal information a qualifying business collects, sells, or discloses, and the underlying purposes for doing so. Upon receiving a request from a consumer, a business will be required to turn over such information. Consumers also have the right to request that a business delete their personal information.

Critically, the CCPA also allows consumers to opt out of having their personal information collected or sold. Consumers that have opted out are protected against denial of goods and services, price discrimination, and discrimination in quality of service. However, businesses can offer financial incentives to consumers for allowing their personal information to be collected and sold. Additionally, offering consumers differing prices or qualities of goods and services when the difference in value is “reasonably related” to the value of the consumer’s data that was not provided is permissible.

Covered businesses must also ensure that their websites contain up-to-date statements regarding their privacy practices that comply with the requirements of the CCPA.

Liability Under the CCPA

The CCPA is enforceable by the California Attorney General. Furthermore, if unauthorized access, theft or disclosure of a consumer’s personal information occurs, and the business did not maintain reasonable security practices, consumers can file a civil action (including a class action) provided (i) the consumer first notifies the company of a suspected breach, and (ii) the company does not cure the violation. Even after filing a suit, the consumer must notify the California Attorney General, who then has 30 days to notify the consumer that he will prosecute the action himself, otherwise the consumer can proceed with the suit. Statutory damages through a private civil action range from \$100 to \$750 per consumer per incident, or actual damages, whichever is greater.

Looking Forward

Regardless of any changes to the CCPA made by the California legislature before the implementation deadline (or whether that deadline is extended), California is likely to end up with privacy laws substantially stronger than those in any other portion of North America. Since California has the largest population in the U.S. by far, California’s standard may as a practical matter become a practical minimum standard nationwide.

Companies should stay abreast of the requirements of the CCPA and ensure that they are prepared for the January 1, 2020, compliance deadline. To do so, covered businesses may have to expend substantial time and money to come into compli-

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ance with the CCPA. Certain types of companies — particularly those that monetize consumer information — may find it particularly difficult to integrate the requirements of the CCPA into their businesses. Thus, the CCPA will likely make it more difficult for qualifying businesses to profit from collecting and selling personal consumer data.

In addition to ongoing compliance issues, the CCPA will likely affect the process of mergers and acquisitions for affected companies. Following implementation, both buyers and sellers would want to evaluate whether target companies are subject to the CCPA and, if so, determine how this will affect valuation. The CCPA will also be relevant during the diligence phase of a transaction, as it will be necessary to determine whether a company is subject to the CCPA and, if so, whether there are any compliance shortcomings, and whether they can be remedied.

Given the significance of the CCPA, it is expected that there will be significant lobbying activity in the year and a half leading up to its implementation that could lead to changes in the law. Nevertheless, the CCPA is likely to remain a substantively strong privacy law that could become a framework for other states (or even the federal government) to use in passing similar laws strengthening privacy protections for their own citizens. We will continue to monitor lobbying efforts with respect to this law and will update this alert as necessary.

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