

September 6, 2018

Update—Important Amendments to the California Consumer Privacy Act of 2018

California State Legislature Amends Recently Enacted California Privacy Statute to Include Key Clarifications and Additional Exemptions for Businesses

SUMMARY

On August 31, 2018, the California State Legislature passed a bill, SB 1121 (“Amendments”), amending the recently enacted California Consumer Privacy Act of 2018 (“CCPA”).¹ The CCPA, which was enacted on June 28, 2018 and is scheduled to take effect on January 1, 2020,² sets forth numerous rules for businesses that buy, collect, transfer or sell a consumer’s personal information. After the bill receives approval or acquiescence by Governor Brown, the Amendments would generally become operative at the same time that the CCPA is scheduled to take effect. We previously described the CCPA and its significant implications for businesses in our memorandum dated [July 2, 2018](#). In addition to correcting various drafting errors, the Amendments include several substantive revisions to provisions that have been the subject of extensive discussion and debate following the CCPA’s enactment. Most notably, the Amendments include:

- ***A Clarification of the Gramm-Leach-Bliley Act (“GLBA”) Exemption:*** As noted in our prior memorandum, the CCPA contains an exemption indicating that “[t]his title shall not apply to personal information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act (Public Law 106-102), and implementing regulations, if [the CCPA] is in conflict with [GLBA].”³ The Amendments remove the “in conflict with” requirement from this exemption (as well as a similar exemption related to the Driver’s Privacy Protection Act of 1994)⁴ and expand the exemption to apply to information collected, processed, sold or disclosed pursuant to the California analog to GLBA, the California Financial Information Privacy Act (“CFIPA”).⁵ Removing the “in conflict with” clause is particularly significant, because GLBA contains a deferential savings clause indicating that it supersedes state laws only to the extent of an inconsistency, and that state laws are not inconsistent if they provide greater protection than GLBA.⁶ Thus, the Amendments remove a potential ambiguity in the CCPA and clarify that the

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CCPA does not apply to information collected under GLBA and the CFIPA. This GLBA/CFIPA exemption will not apply, however, to the private right of action the CCPA grants consumers for certain data breaches. Therefore, although the collection, processing, sale or disclosure of information pursuant to GLBA/CFIPA would not be subject to the requirements of the CCPA, such as the right to know or right to delete, the Amendments indicate that if such information were to become exposed in a data breach meeting applicable criteria, businesses could still face liability under the CCPA (in addition to the potential liability such businesses may face under any other applicable laws or regulations).

- ***An Expansion of the Exemption Related to Certain Medical Information:*** The CCPA contains an exemption for medical information governed by California's Confidentiality of Medical Information Act ("CMIA") or protected health information that is collected by a covered entity governed by rules established pursuant to the Health Insurance Portability and Availability Act ("HIPAA").⁷ The Amendments expand the exemption to also exempt such information collected by "business associates" of such covered entities, as that term is defined in the applicable Department of Health and Human Services ("HHS") federal regulation.⁸ Additionally, the Amendments exempt health care providers governed by the CMIA and covered entities governed by privacy, security and breach notification rules issued by HHS pursuant to HIPAA, to the extent the health care provider or covered entity maintains patient information in the same manner as medical information under CMIA or protected health information under HIPAA, as applicable. Finally, the Amendments also exempt information collected as part of clinical trials when pursuant to guidelines issued by the International Council for Harmonisation or U.S. Food and Drug Administration requirements.
- ***An Exemption for Noncommercial Press Activities:*** The Amendments include a new exemption for noncommercial activities of persons or entities covered by press activities protected by Section 2(b) of the California Constitution.⁹
- ***Other Changes:***
 - ***Revisions to Penalty Provisions:*** A business may be subject to statutory damages for violations of the CCPA in the amount of: (i) up to \$2,500 per violation not cured within 30 days of notice and (ii) up to an additional \$7,500 per violation for intentional violations.¹⁰ The CCPA would impose such damages by amending the penalty provisions of California's Unfair Competition Law.¹¹ But the civil penalty provisions of California's Unfair Competition Law were enacted through a ballot initiative,¹² which under the California Constitution may not be amended by the legislature.¹³ The Amendments seek to correct this constitutional defect by imposing the same statutory damages as part of a standalone CCPA penalty provision for which the California Attorney General had advocated.¹⁴ In addition to clarifying the applicable statutory damages, the Amendments would also provide the California Attorney General with an injunction remedy for businesses that violate the CCPA, relief that the CCPA previously made available only in the limited private right of action for certain data breaches.
 - ***A Delayed Requirement for Finalization of Regulations and Possible Enforcement Actions:*** The CCPA generally requires the California Attorney General to adopt regulations implementing the CCPA no later than January 1, 2020, though certain regulations must be finalized within one year of the CCPA's enactment.¹⁵ The Amendments would delay this general deadline to July 1, 2020 and also prohibit enforcement actions brought by the California Attorney General under the CCPA until the earlier of: (i) July 1, 2020 or (ii) six months after the publication of final regulations. Notwithstanding the general extension, the Amendments do not appear to have changed one-year deadlines to adopt regulations that would establish: exceptions necessary to comply with state or federal law;¹⁶ rules, procedures and exceptions to ensure notices and other information required to be provided to consumers is in a manner that may be easily understood, accessible to consumers with disabilities and in the language primarily used to interact with the consumer;¹⁷ and rules and procedures to further the purposes of CCPA sections implementing the right to know and right to access as well as the procedural implementation of related requirements.¹⁸

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- *Procedural Changes to Private Rights of Action:* The CCPA creates a private right of action in the event of certain data breaches but requires consumers to provide the California Attorney General notice within 30 days of filing a suit in order to provide the California Attorney General with an opportunity to object before proceeding with private litigation.¹⁹ The Amendments eliminate this notice requirement (a change for which the California Attorney General had also advocated) and also clarify that the private right of action does not apply with respect to any provision of the CCPA other than data breaches.²⁰
- *Various Other Technical Changes:* Among other technical changes, the Amendments clarify that service providers that receive personal information pursuant to an exemption from the CCPA's definition of "sale" may not further collect or use such personal information except as necessary to perform a business purpose.

IMPLICATIONS FOR BUSINESSES

Although several of the changes described above provide important clarifications and additional exemptions for businesses—particularly the clarification of the GLBA/CFIPA exemption—the CCPA still contains numerous provisions that may create compliance difficulties for businesses that are not addressed by the Amendments. As an example, the Amendments do not change the CCPA's narrow construct of which legal entities are part of a "business," which the CCPA limits to parents and subsidiaries and does not extend to other affiliates under common control with a business.²¹

The Amendments also do not clarify how businesses may comply with the CCPA's requirement to provide consumers with *ex-ante* notice of the categories of personal information to be collected and purposes of which such personal information will be used.²² Businesses may seek to comply with this obligation by including such disclosures in their publicly posted privacy policies, but neither the CCPA nor the Amendments expressly indicate that doing so would satisfy the applicable requirement. Similarly, the CCPA's broad definition of "collects,"²³ which triggers requirements related to the rights to know, access and delete,²⁴ appears to apply to a business's vendors and contractors. Although a business that shares personal information of its customers with a vendor or contractor may rely on certain exceptions under the CCPA to minimize disclosures related to this sharing, the vendor or contractor may still be subject to right to know, access or deletion requests from that business's consumers, even if it has no direct contact with any consumers. In addition, the CCPA's right to access is ambiguous as to whether it creates an implied data retention requirement for personal information not retained in the ordinary course of business. Although the Amendments contain certain technical changes that make clear that the CCPA does not require a business to retain personal information collected for a "single, one-time transaction,"²⁵ they do not clarify whether or how businesses should comply with requirements related to the right to access for other personal information not ordinarily retained.

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ENDNOTES

- 1 California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.100 *et seq.*
- 2 *Id.* § 1798.198. The effective date of the CCPA was conditioned upon the withdrawal of ballot initiative No. 17-0039, The Consumer Right to Privacy Act of 2018. The California Secretary of State announced that the ballot initiative was withdrawn on June 28, 2018. *Proponents Withdraw Initiative to Establish New Consumer Privacy Rights; Expand Liability for Consumer Data Breaches*, CAL. SECRETARY OF STATE, <http://www.sos.ca.gov/administration/news-releases-and-advisories/2018-news-releases-and-advisories/proponents-withdraw-initiative-establish-new-consumer-privacy-rights-expand-liability-consumer-data-breaches/> (last accessed Sept. 5, 2018).
- 3 CAL. CIV. CODE § 1798.145(e).
- 4 *Id.* § 1798.198(f).
- 5 CAL. FIN. CODE § 4050 *et seq.*
- 6 15 U.S.C. § 6807.
- 7 CAL. CIV. CODE § 1798.145(c). As drafted, the CCPA appears to have omitted the word “medical” from this provision; this has been corrected by the Amendments.
- 8 45 C.F.R. § 160.103.
- 9 CAL. CONST. art. I, § 2(b).
- 10 CAL. CIV. CODE § 1798.155(a)–(b).
- 11 *Id.*
- 12 *Proposition 64: Text of Proposed Laws*, CAL. SECRETARY OF STATE, <https://vig.cdn.sos.ca.gov/2004/general/propositions/prop64text.pdf> (last accessed Sept. 5, 2018).
- 13 CAL. CONST. art. II, § 10(c).
- 14 Letter from Xavier Becerra, Cal. Attorney Gen., to Hon. Ed Chau, Cal. State Assembly, and Hon. Robert M. Hertzberg, Cal. State Senate 2–3 (Aug. 22, 2018), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2801&context=historical>.
- 15 CAL. CIV. CODE §§ 1798.185(a)(3)–(4), (6), (7).
- 16 *Id.* § 1798.185(a)(3).
- 17 *Id.* § 1798.185(6).
- 18 *Id.* § 1798.185(7).
- 19 *Id.* § 1798.150(b).
- 20 Letter from Xavier Becerra to Hon. Ed Chau and Robert M. Hertzberg, *supra* note 14, at 2.
- 21 CAL. CIV. CODE § 1798.140(c)(2).
- 22 *Id.* § 1798.100(b).
- 23 *Id.* § 1798.140(e).
- 24 *Id.* §§ 1798.100, 1798.105, 1798.110.
- 25 *Id.* § 1798.100(e).

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