

Identifying and Addressing Risks Under the California Consumer Privacy Act

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Today's Webinar Presenters



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Roadmap: Where We Are Headed Today

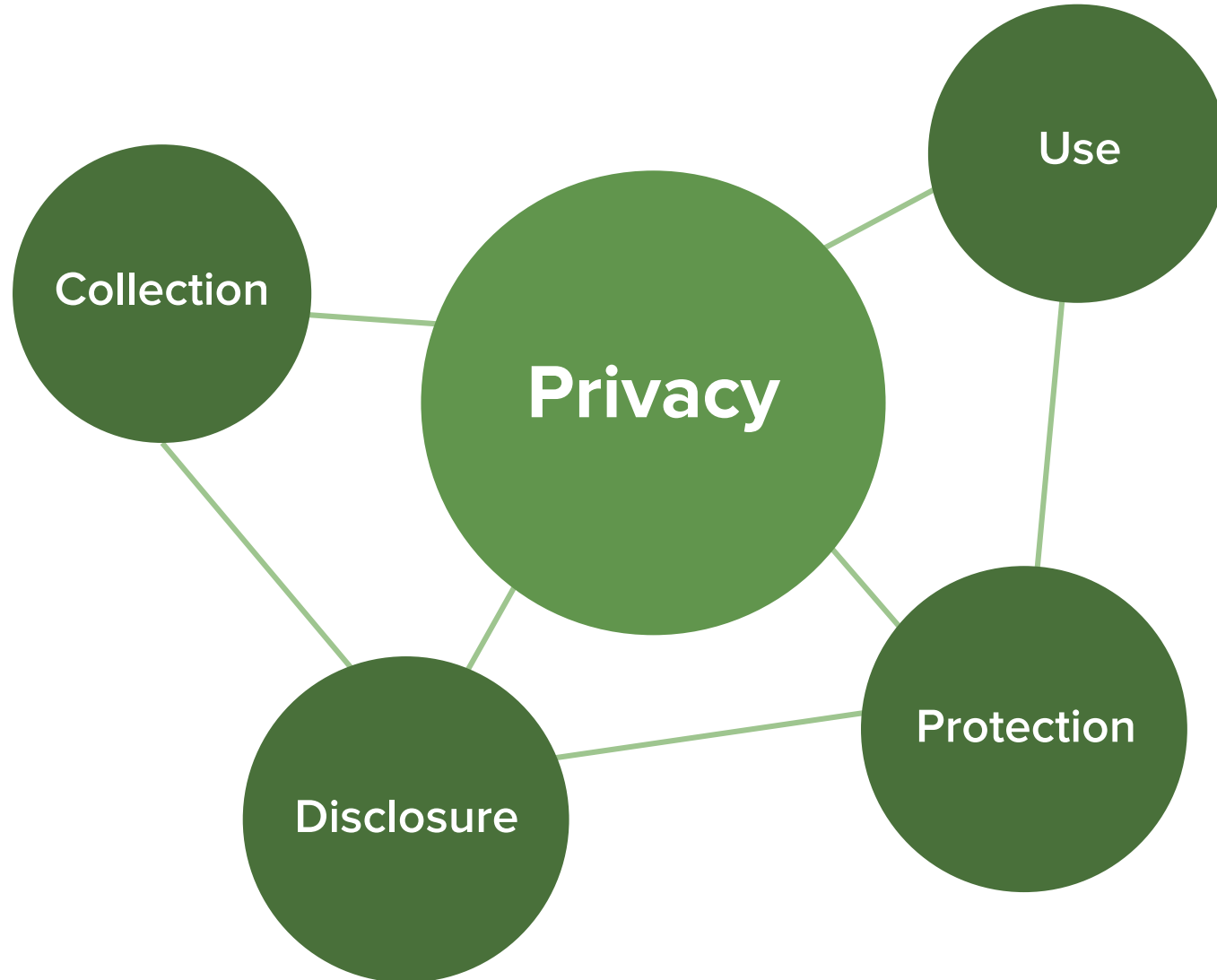
- The US Privacy Regulatory Landscape Pre-CCPA
- The CCPA Requirements (As of Today)
- What CCPA Could Look Like Tomorrow (Maybe)
- The Private Right of Action
- CCPA Copycats
- What to Do Now To Comply With an Incomplete Law

The US Privacy Regulatory Landscape Pre-CCPA



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Decoding the Buzzword



What Is The Regulatory Scheme?

- **Federal Industry Laws** (*HIPAA, FCRA, GLBA*)
- **Unfair and Deceptive Trade Practices** (*under Section 5 of the FTC Act and state “mini-FTC Acts”*)
- **Privacy Policy Laws** (*e.g., California, Delaware and Nevada*)
- **Biometric Information Laws** (*e.g., Illinois, Washington and Texas*)
- **State Data Protection Laws** (*e.g., Massachusetts, Nevada, Maryland and Colorado*)
- **Social Security Number Laws** (*e.g., to prevent the public disclosure and ensure the secure transmission of SSNs*)
- **Industry Standards** (*e.g., PCI DSS and the DAA’s Self-Regulatory Program*)
- **Marketing Laws** (*e.g., TCPA and related state laws and CAN-SPAM*)
- **State Breach Notification Laws** (*50 laws for 50 states*)

The CCPA Requirements (As of Today)



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From Zero to CCPA In Seven Days

- In September 2017, Californians for Consumer Privacy proposed a statewide ballot initiative named the “California Consumer Privacy Act”
 - Inspired by GDPR
 - CA law allows passage of legislation through ballot initiatives without any action by the state legislature
- Following the Facebook Cambridge Analytica scandal in April 2018, the initiative is likely to appear on the November 2018 ballot
- On June 21, 2018, the CCPA sponsors agreed to withdraw the initiative in exchange for the state legislature agreeing to pass a version of the CCPA
- The CCPA was passed by the California legislature and signed into law on June 28, 2018



CCPA Doesn't Apply to Me... *Not So Fast!*



- The CCPA broadly applies to any for-profit entity that:
 - “Does business” in California; and
 - Meets one of the following thresholds:
 - has an annual gross revenue of over \$25 million (to be adjusted for inflation);
 - annually buys, receives, or sells the personal information of more than 50,000 consumers, households, or devices for commercial purposes; or
 - derives 50% or more of annual revenues from the sale of consumers’ personal information

The “Who” and “What” of CCPA

- The CCPA regulates the “personal information” of “consumers”
- Two key definitions show the breadth of the law:
 - “Consumer” is defined as any California resident (as defined by California tax regulations)
 - “Personal information” is defined as any 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”

Personal Information Means...

Examples of Personal Information

- Real name
- Postal address
- IP address
- Email address
- Account name
- Social Security number
- Driver's license number
- Records of property, products or services purchases, obtained, or considered, or other purchasing or consuming histories and or tendencies
- Biometric information
- Internet or other network activity, including browsing history and search history
- Geolocation data
- Audio, electronic, visual, thermal or olfactory information
- Professional or employment-related information
- Education information that is not publicly available
- Inferences drawn from any of this information to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes

But I'm Already Regulated!

Financial and Health Data

- The CCPA contains partial exemptions for data information that is covered under GLBA and HIPAA
 - Note this is an exemption for data covered by those laws, not for entities subject to those laws
 - Therefore, financial institutions and health care companies that have traditionally been exempt from state privacy laws will be subject to the CCPA to some extent



What About Employees?

Employee Information

- It is currently an open question the extent to which the CCPA will apply to employees
 - Employees were accidentally included in the definition of “consumer”
 - California AB 25 would fix that error, but was recently weakened
 - Employees may take advantage of the private right of action for breaches

Unprecedented Consumer Rights

Right to Notice

Right to Access

Right to Portability

Right to be Forgotten

Right to Opt Out

Right to Equal Services & Prices

Increased Company Obligations

- Increases disclosure and notice requirements
 - Website privacy policy requirements
- Requires implementation of mechanism to handle consumer requests (e.g., “Do Not Sell My Data” button)
- Creates mandatory contract terms for vendors and service providers
- Increases enforcement
 - Private right of action for data breaches
 - Creates statutory damages for AG enforcement actions

What CCPA Could Look Like Tomorrow (Maybe)



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Pending Amendments

- In addition to the already discussed amendment relating to employees, several amendments remain under consideration, including:
 - Excluding **publicly available, aggregated, or de-identified** data from the definition of “personal information”
 - Creation of a **data broker** registration with the CA attorney general
 - Requiring CA businesses to disclose the use of **facial recognition technology** with a clear and conspicuous notice at entrances

Pending Amendments (Cont.)

- Clarification that different treatment for **loyalty program** participants is not “discrimination” under the CCPA
- However, the CA senate also recently weakened this amendment. As revised, the amendment:
 - Makes clear that the “exemption” does not apply to requests for deletion; and
 - Bars businesses from selling consumer data collected via loyalty programs

Implementing Regulations

- In addition to the pending amendments, the CA attorney general's office must create implementing regulations
- These regulations must be adopted on or before July 1, 2020

The Private Right of Action



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The Perfect Storm

- Aggressive Plaintiffs' Bar
- Uncapped Statutory Damages
- Strict Liability & Tough to Dismiss at Pleading Stage
- Bet the Business Class Action Damages Calculations
- Vague and Ambiguous Statute
- Ever Changing Regulatory Landscape

Enforcement and the Private Right of Action



- The CCPA (currently) lacks a general private right of action
 - Statutory amendment failed, but is likely to be reintroduced
 - The California AG has publicly stated that it cannot handle enforcement and would support a private right of action

Regulatory Enforcement



- The California AG may bring enforcement actions
 - \$2,500 for most violations; \$7,500 for “intentional” violations
 - Penalty is for “each” violation
 - Not clear if “each” violation refers to each individual incident, or each affected record
 - Hypothetical: A business improperly sells personal information relating to 1,000 consumers. \$2,500 or \$2,500,000?
 - Likely the latter



The Private Right of Action

- There is a private right of action for data breaches for info protected under breach law
 - Failure to implement “reasonable” security procedures and practices to protect information
 - Must provide opportunity to “cure”
 - Consumers may seek the higher of actual damages or up to \$750 per incident
 - This private right of action applies to employee data
- Availability of statutory damages likely to increase class action
 - Data breaches typically face limited class action interest outside of the biggest breaches
 - It is difficult to prove actual damages

Insurance Coverage of CCPA Claims

- Likely to be fights with insurance carriers regarding coverage of CCPA claims
- We are seeing similar fights for other consumer information statutes containing statutory damages and private rights of action (e.g., TCPA and BIPA)

We've Been Here Before...

TCPA



BIPA



CCPA

CCPA Copycats



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What's Next?

- Several states have considered legislation that essentially mimic the CCPA (e.g., CT, IL, MD, RI, WA, HI, NJ, NM, TX)
 - None of these bills gained much traction in the spring legislative session
 - Several are expected to return in future legislative sessions
- CT and TX have passed legislation directing the creation a task force to recommend appropriate privacy legislation
 - Includes studying the implementation of the CCPA



CCPA “Lite”

- Several states have proposed more limited legislation governing online privacy practices
 - Nevada – Provides consumers with the right to opt out of the sale of their data
 - Maine – Requires internet service providers to obtain express opt-in consent before processing consumer data
 - Bills similar to the Nevada law are pending in other states, including Illinois and New Jersey



Going Beyond the CCPA

- Several states have proposed bills that would go farther than the CCPA
 - New York Privacy Act –
 - Requires opt-in consent before processing consumer data,
 - Places a fiduciary duty on businesses processing consumer data, and
 - Contains a global private right of action
 - Massachusetts S. 120 – Contains a general private right of action



What to Do Now To Comply With an Incomplete Law



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Steps to Take Now Towards Compliance



- **Understand your data flow through data mapping**
 - How does information flow through your company?
 - Where does it come from, where is it stored, and where does it go?
 - Understand the scope of your potential liability
- **Assess data security**
 - Undergo an audit, certification, and/or penetration testing
 - Implement additional controls as necessary to meet best practice recommendations or established frameworks (e.g., NIST)
 - May become part of a defense in the event of a data breach class action in 2020 and beyond

Steps to Take Now Towards Compliance (Cont.)



- **Update your policies and procedures**
 - Account for disclosure requirements and consumer requests
- **Monitor developments**
 - Includes finalization of CCPA amendments and implementing regulations from the AG
- **Update your contracts**
 - CCPA contains specific contractual requirements
 - Ensure that you are not inadvertently “selling” data
 - Includes talking to your vendors (next slide)

Talk to Your Vendors...

.... *They are probably as unhappy as you are about CCPA*

- How are they preparing for CCPA?
- What are they doing with your personal information?
- Have they reviewed their downstream contracts to confirm that no sale of personal information will occur?
- When was their last risk assessment?
- What does your contract say about compliance with law?
 - Are there appropriate indemnification and liability provisions?
 - Do you need to execute an amendment to the contract to limit the vendor's use of personal information?

Questions?



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Thank You



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