

California Consumer Privacy Act of 2018 (the “CCPA”)

On June 28, 2018, the California governor signed [AB 375](#), the California Consumer Privacy Act of 2018 (the “CCPA”), intended to protect the private data of consumers. The CCPA contains rigorous new consumer privacy requirements and has significant implications for entities doing business in California. The new requirements do not go into effect until January 1, 2020, but businesses should begin to prepare now.

The CCPA affords consumers greater control over their personal information and places additional responsibilities on a business with respect to the collection, use, maintenance and sale of consumers’ personal information. For example, the CCPA provides consumers with greater transparency and access to their personal information, deletion rights, disclosures, and opt-out rights. It also affords consumers the right to sue and can lead to fines levied against a business.

In order for a business to comply with requirements of the CCPA, it must make available to consumers two (2) or more designated methods for submitting requests for information required, including a toll-free telephone number and a website address. Additional key aspects of the CCPA include:

- **Applicability:** The CCPA will apply to for-profit entities that do business in California and meet the following criteria:
 - Have annual gross revenues over \$25 million; or
 - Alone or in combination annually buys, receives, sells, discloses or shares for commercial purposes the personal information of 50,000 or more California consumers, households, or devices; or
 - Derives 50% or more of its annual revenues from selling California consumers’ personal information.
- **Personal Information:** The new law defines both “personal information” and “consumers” broadly. “Personal information” is defined as “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.” A “Consumer” is, any natural person who is a California resident, including employees, patients, students and other categories of individuals so long as they are California residents. The CCPA excludes publicly available information including information that is lawfully made available from federal, state, or local government records. This definition of personal information is broader than state breach notification laws defining personally identifiable information and should be considered to essentially cover any type of information that identifies a consumer.
- **Disclosures:** Under the CCPA, consumers have the right to seek disclosure of any of their personal information a business has collected. Specifically, a business must disclose the:
 - Categories and specific pieces of personal information the business has collected about the consumer;
 - Categories of sources from which the personal information is collected;
 - Business or commercial purposes for collecting, selling or disclosing personal information; and
 - Categories of third parties with whom the business shares the personal information.

The CCPA requires a business to provide this information in response to a verifiable consumer request up to twice a year. The disclosures must be made within forty-five (45) days of receipt of the request and cover the 12-month period preceding the business's receipt of the verifiable request.

- **Right to Request Deletion of Personal Information:** The new law gives a consumer the right to request deletion of personal information and requires the business to delete such information when the business receives a verified request. However, a business does not have to honor this request if it is necessary to retain the information due to any of the enumerated exemptions contained in the CCPA.
- **Opt-Out and Discrimination:** The CCPA authorizes a consumer to opt-out of the sale of personal information by a business and prohibits the business from discriminating against the consumer for exercising this right, among other rights, including by denying goods or services, charging the consumer who opts out a different price, or providing the consumer a different quality of goods or services, except if the difference is "reasonably related to the value provided to the consumer by the consumer's data." Any business that offers a consumer loyalty or similar program must provide clear notice of any such financial incentives to consumers, may only enroll a consumer in an incentive program if he or she has expressly opted into the incentive, and should evaluate that program and the data collected pursuant to that program for compliance with the requirements of the CCPA. The opt-out section of the CCPA requires that consumers be provided a "clear and conspicuous link on the business' Internet homepage, titled '**Do Not Sell My Personal Information**,'" to opt-out of the sale of their personal information. This can be linked through a business's online privacy policy. California already has baseline requirements for online privacy policies found in the California Online Privacy Protection Act ("COPPA"), and now is a good time for entities doing business in California to review compliance with both the CCPA and COPPA.
- **Federal Law Carve Outs:** Generally speaking, the CCPA does not apply to personal information protected by the Health Insurance Portability and Accountability Act ("HIPAA"), the Fair Credit Reporting Act ("FCRA"), the Gramm-Leach-Bliley Act ("GLBA"), and the Driver's Privacy Protection Act ("DPPA"). Significantly, these exceptions relate to the information covered pursuant to those statutes, not the entities themselves. Therefore, the CCPA does not apply to the sale of personal information to or from a Consumer Reporting Agency if that information is part of a Consumer Report under the FCRA.
- **Protections for Minors:** The new law prohibits a business from selling the personal information of a consumer under 16 years of age unless the sale is affirmatively authorized (*i.e.*, through an express opt-in). Consumers between ages 13-16 can opt-in for themselves, and a business must obtain a parent or guardian's affirmative authorization (express opt-in) for consumers under the age of 13.
- **Supply-Chain Compliance:** The CCPA requires that businesses instruct their service providers to delete the personal information of any consumer whose personal information was deleted by the business, unless an exception applies under the CCPA or other applicable law. Further, service providers that do not collect personal information of consumers on their own behalf will still need to ensure that they can operationalize deletion of data they hold on behalf of another business.

The CCPA excepts from the definition of "third parties" those entities with whom a business has a written contract prohibiting (a) the sale of the personal information the business discloses

to that entity and (b) use or disclosure of the personal information the business discloses to that entity for any purpose other than the provision of services as provided in the contract. This is important for businesses to consider because the CCPA generally requires businesses to disclose to consumers how the business shares personal information with third parties, and including these requirements in a business's contract with an entity, could reduce the number of "third parties" to which it discloses personal information and reduce the business's disclosure burdens under the CCPA.

- **Enforcement and Private Right of Action:** The CCPA will be enforced by the California Attorney General and provides a private right of action in connection with certain unauthorized access and exfiltration, theft, or disclosure of a consumer's non-encrypted or non-redacted personal information. Under the CCPA, a consumer is entitled to recover actual damages or statutory damages of between \$100 and \$750 per consumer per incident (whichever is greater). In addition, injunctive or declaratory or other relief is made available. Before bringing any action against a business for statutory damages, a consumer must provide a business with written notice within thirty (30) days identifying the consumer's specific allegations and there is a thirty (30) day right to cure period. Furthermore, the consumer must notify the Attorney General within thirty (30) days that an action has been filed.
- **Timeline for Compliance:** The new requirements go into effect on January 1, 2020. The CCPA expressly gives the Attorney General the ability to adopt additional regulations to carry out the CCPA. Due to the hasty passage of the CCPA, it is widely believed by industry and legal experts that the law will change before it comes into force. Nevertheless, it is highly prudent that the main components of the CCPA be implemented and complied with as written in the interim.