



California: CCPA proposed regulations and more

On 10 October 2019, after much anticipation, the California Attorney General ('AG'), Xavier Becerra, held a press conference and announced the release of proposed regulations¹ ('the Draft Regulations'), intended to further the purposes of the California Consumer Privacy Act of 2018 ('CCPA'). Jim Snell, Marina Gatto, and Zachary Watterson, from Perkins Coie LLP, provide an overview of the Draft Regulations, and look at what impact the Draft Regulations and other privacy developments in California will have on businesses.

The CCPA Draft Regulations

The AG stated that data is today's gold, and much like California's gold rush over 100 years ago, where people rushed to mine gold from the land, today there is a rush to mine data. The Draft Regulations will be open for public comment until 6 December 2019, and the AG will hold four public hearings² across the state. The AG's office has also indicated that the Draft Regulations will be updated to reflect the 2019 amendments to the CCPA that were signed into law by Governor Gavin Newsom earlier this month. The AG stated during a press conference that it is his office's goal to have the final CCPA regulations filed sometime in January 2020.

The Draft Regulations would provide important clarification on some aspects

of the CCPA, and would also add new requirements that businesses subject to the CCPA would need to address. We highlight several of these provisions below. Many businesses' operations would likely be impacted by the Draft Regulations, and businesses are assessing how to factor them into compliance efforts before the CCPA goes into effect on 1 January 2020. Data may be viewed as the new gold, as declared by the AG, but businesses, after waiting nearly a year for the Draft Regulations, are still left mining for answers as to what exactly their obligations are under the CCPA.

'Non-discrimination' and financial incentives clarification

The Draft Regulations would add some clarification to the CCPA's non-

discrimination provision by noting that a differential price or service offering is permitted if it is 'reasonably related' to the value of the consumer data. This is a helpful clarification, especially when coupled with the recent CCPA amendments which were signed into law by the Governor earlier this month, as the CCPA currently states that a business can only offer 'a different price, rate, level or quality of goods or services to the consumer if that price or difference is directly related to the value provided to the business by the consumer's data,' according to §1798.125(b)(1) of Part 4 of Division 3 of the California Civil Code ('Cal. Civ. Code'). Thus, businesses may now have some flexibility in making reasonable distinctions between users whose choices impact the ability to offer a particular service.



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The Draft Regulations also provide clarification on how a business that offers financial incentives should provide the notice to consumers required under §1798.125 of the CCPA. In §999.307(b)(5) of the Draft Regulations, it is specified that businesses would need to provide notice that includes an explanation of why the financial incentive, price, or service difference is permitted, and should include a 'good-faith estimate of the value of the consumer's data that forms the basis for offering,' the incentive or difference, and a 'description of the method the business used to calculate the value of the consumer's data.'

Service provider clarifications

In clarifying the role of a 'service provider' under the CCPA, the Draft Regulations make it clear that service providers can collect data directly from a business' end-users and do not need to receive this data from the business itself. Additionally, in §999.314(c) of the Draft Regulations, service providers are permitted to combine personal information received from multiple business customers 'to the extent necessary to detect data security incidents, or protect against fraudulent or illegal activity.'

Complying with requests to delete

The Draft Regulations specify that in responding to a request to delete, if the requestor's identity cannot be verified, the business' do not need to comply with the request to delete. However, the Draft Regulations would impose additional requirements where the requestor's identity cannot be verified. The business would need to notify the requestor that the business will not comply with the request, including the bases for the denial and any exceptions relied upon, and treat their deletion request as a request to opt-out of sale.

Where a business complies with a consumer's request to delete, the Draft Regulations add several new requirements in §999.313(d)(2), including that a business must 'specify the manner in which it has deleted the personal information,' and inform the consumer that it will maintain a record of their deletion requests.

No notice required for indirect collection

Under §1798.100(b) of the Cal. Civ. Code, the CCPA requires that a business provides notice to consumers 'at or before the point of collection' as to the categories of personal information to be collected and

the purposes for which it will be used. Under the Draft Regulations, a business that indirectly collects personal information would not need to provide notice to consumers. However, if businesses were to sell the personal information that was indirectly collected, then the business would need to either contact the consumer directly, to provide notice and an opportunity to opt-out, or obtain signed attestations from the source of the data on how the source gave notice at the collection point.

No requirement to provide sensitive data

The Draft Regulations would confirm that businesses do not need to provide sensitive data, such as social security numbers, government ID numbers, financial account numbers, health insurance or medical ID numbers, or account passwords, to consumers in response to a verified request. This is an important privacy protective clarification.

Additional consent requirements
The Draft Regulations would impose a new burden on businesses to obtain explicit consent for any new uses of personal information that the consumer was not previously notified

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of. Under the Draft Regulations, prior to using any category of a consumer's personal information for a new or additional business or commercial purpose, a business would need to provide notice and obtain explicit consent from the consumer to use the data for the new purpose.

Additional opt-out requirements

The Draft Regulations appear to broaden what would be considered a request to opt-out of the sale of personal information. For example, the Draft Regulations specify in §999.315(h) that a 'request to opt-out need not be a verifiable consumer request.' Additionally, §999.315 of the Draft Regulations would require businesses to honour 'sale' opt-outs sent by browsers, devices, or other user agents.

New timing requirements

The Draft Regulations go beyond the CCPA's current requirements by imposing additional obligations on businesses to take certain actions within certain timeframes. The CCPA, under §1798.130(a)(2) of the Cal. Civ. Code, currently requires businesses to disclose and deliver information requested within 45 days of receipt of a consumer's request. Under §999.313(a) of the Draft Regulations, businesses would be required to confirm receipt of a request to know or delete within 10 days and provide the consumer with information about how they would process the request. Likewise, under §999.315(e) of the Draft Regulations, businesses would be required to act upon an opt-out request 'as soon as feasibly possible, but no later than 15 days from the date the business receives the request.' These new timing requirements may impact business's CCPA compliance tools in order to take into account these new time frames.

New record keeping requirements

In §999.317(b) of the Draft Regulations, businesses are required to 'maintain records of consumer requests made pursuant to the CCPA and how the business responded to said requests for at least 24 months.'

In addition, businesses that buy, receive, sell, or share the personal information of 4 million California residents or more, would also be required to compile detailed metrics for the previous calendar year, such as the median number of days it took the business to respond to consumer requests, and publish this information in their privacy policy.

What happens next?

With the announcement and release of the Draft Regulations, the AG initiated the formal rule-making process for the statutorily mandated rules under the CCPA. From the time of publication until 5:00 p.m. PST on 6 December 2019, the Draft Regulations will be in a public comment period phase, during which the AG's office will be collecting feedback on the Draft Regulations, including during public hearings held across the state.

After the public comment period ends, the AG will review the feedback given and make any further changes to the Draft Regulations deemed necessary. Depending on how substantial those potential changes are, there may be an additional public comment period before the final regulations are adopted. As stated, however, the AG announced that it is his goal to have the Draft Regulations adopted and filed with the California Secretary of State by early January 2020.

With the CCPA set to go into effect on 1 January 2020, many businesses will be spending the next few months considering how to address the Draft Regulations and still evolving regulations into their CCPA compliance efforts.

Other California privacy law developments

CCPA 2.0: The California Privacy Enforcement Act

The Draft Regulations are not the only noteworthy privacy development currently taking place in California. On 25 September 2019, Alistair MacTaggart, whose efforts to introduce a California privacy ballot

initiative resulted in the California legislature enacting the CCPA in 2018, introduced a new ballot initiative, the California Privacy Enforcement Act ('the Initiative'). He has since introduced a second and third version of this initiative and Mr. MacTaggart intends to put the Initiative on California's November 2020 general election ballot. The Initiative would amend the CCPA, and include a number of new provisions, obligations, and enforcement mechanisms. Most notably, the Initiative would create a new statewide agency, the California Privacy Protection Agency ('the Agency'), which would be designed to enforce the CCPA. The Agency would be required to investigate consumer complaints of possible CCPA violations and have the authority to issue cease and desist orders, and fine businesses \$2,500 for each violation of the CCPA and \$7,500 for each intentional violation. The funds from these fines would support a Consumer Privacy Fund.

If the Initiative is enacted, it would mean that the compliance mechanisms put in place for the CCPA would need to be updated to address new obligations in the Initiative.

Conclusion

While the Draft Regulations released by the AG remain in draft form, and will likely undergo further changes, businesses should consider how to engage in the CCPA compliance efforts that take the Draft Regulations and the Initiative into account.

To download the OneTrust DataGuidance 'What You Need To Know' guides for the CCPA and the California Privacy Rights and Enforcement Act request free trial access or sign-in to the OneTrust DataGuidance platform.

1. Available at: <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-proposed-regs.pdf>

2. Available at: <https://oag.ca.gov/privacy/ccpa>