Contemporary Legal Notes

Washington Legal Foundation
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202.588.0302

GOLDEN (STATE) OPPORTUNITY: WHAT BUSINESSES NEED TO KNOW ABOUT RULEMAKING FOR CALIFORNIA'S PRIVACY ACT

by
Gerard M. Stegmaier
Mark D. Quist
Reed Smith LLP

Washington Legal Foundation
CONTEMPORARY LEGAL NOTE Series

Number 79
May 2019

TABLE OF CONTENTS

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ABOUT THE AUTHORS

Gerard M. Stegmaier is an attorney with a global international law firm in Washington, DC whose technology practice focuses on corporate governance, intellectual property, and Internet issues, especially as they relate to privacy, data security and consumer protection in complex regulatory and risk environments. An experienced and pragmatic litigator, Mr. Stegmaier focuses a significant part of his practice on prelitigation and advisory services relating to business strategy for privacy by design, data protection, intellectual property, and emerging technologies and markets, often acting as outside product counsel to leading innovators and disruptive technology companies.

Mark D. Quist is an attorney who practices with Mr. Stegmaier in those same areas. Mr. Quist leverages his background in civil litigation and legal and policy matters involving state attorneys general to advise clients facing government investigations and related compliance issues.

GOLDEN (STATE) OPPORTUNITY:
WHAT BUSINESSES NEED TO KNOW ABOUT RULEMAKING FOR CALIFORNIA'S PRIVACY ACT

INTRODUCTION

Material privacy and data security risks are set to rise again with the coming implementation of the California Consumer Privacy Act (CCPA).[1] In the midst of uncertainty about final compliance requirements of the CCPA, affected entities' participation in an upcoming California Attorney General rulemaking proceeding remains vital.[2]

Virtually any business that collects personal information related to California residents and their households may be affected by the CCPA.[3] Administrative penalties and strike suits filed as consumer class actions seem inevitable under the CCPA given experience with similar California consumer legislation in the past decade. The California Attorney General can levy stiff per-violation civil penalties of up to $7,500.[4] A private right of action provision for data breaches allows California residents to seek statutory penalties of up to $750 on a "per consumer per incident" basis and makes challenges to a plaintiff's standing—the primary way defendants

[1] California Consumer Privacy Act of 2018, Cal. Civ. Code §§ 1798.100-1798.199 (2018).

[2] *Id.* at § 1798.185(a) (requiring the Attorney General to adopt regulations).

[3] *Id.* at § 1798.140(c) (defining "business").

[4] *Id.* at § 1798.155 (Attorney General enforcement and civil penalties).

have defeated such suits in the last decade—more difficult.[5] The law takes effect in January 2020, and enforcement by the California Attorney General is likely to begin in July 2020. However, portions of the law will look back to conduct in 2019 barring some interpretative relief from the California Attorney General and/or amendment by the California State Legislature.[6]

Despite the looming deadlines, penalties, and litigation risk, tremendous uncertainty persists about the meaning and application of the CCPA. Amendments to the law continue to be introduced, and more are anticipated this year.[7] One prominent California-based legal scholar routinely refers to the CCPA as a "dumpster fire" for businesses and consumers.[8] Bipartisan calls for a nationwide consumer privacy law have increased in Congress since passage of the CCPA, and business groups have begun crafting suggested federal legislation.[9]

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[5] *Id.* at § 1798.150 (creating a private right of action).

[6] *Id.* at §§ 1798.185(c), 1798.198(a) (identifying the timeline for enforcement to begin and the effective date of the CCPA).

[7] *See* Gerard Stegmaier & Mark Quist, California Attorney General Proposes Expanded CCPA Private Right of Action Following State Assembly Hearing on Possible 2019 Amendments to the Landmark Privacy Law, https://www.technologylawdispatch.com/2019/02/regulatory/california-attorney-general-proposes-expanded-ccpa-private-right-of-action-following-state-assembly-hearing-on-possible-2019-amendments-to-the-landmark-privacy-law/ (last visited Mar. 19, 2019) (discussing current CCPA amendment proposals).

[8] *See* Eric Goldman, Recap of the California Assembly Hearing on the California Consumer Privacy Act, https://blog.ericgoldman.org/archives/2019/02/recap-of-the-california-assembly-hearing-on-the-california-consumer-privacy-act.htm (last visited Apr. 10, 2019) (incorporating Professor Goldman's "usual . . . dumpster fire visual metaphor" in reviewing a recent CCPA legislative hearing).

[9] *See* Cameron F. Kerry, https://www.brookings.edu/blog/techtank/2019/01/07/will-this-new-congress-be-the-one-to-pass-data-privacy-legislation/ (last visited Apr. 15, 2019) (highlighting Congressional and industry efforts to shape potential federal consumer privacy legislation).

This CONTEMPORARY LEGAL NOTE focuses on the California Attorney General's pending administrative rulemaking proceeding. This proceeding represents the primary mechanism for businesses to achieve some relief from the enormous burdens and obtain much needed clarification of the hastily enacted law. The article first examines key provisions of the CCPA, then describes the CCPA rulemaking timeline and rulemaking process, and concludes by analyzing how interested businesses may effectively participate in the California rulemaking process.

I. THE CALIFORNIA CONSUMER PRIVACY ACT OF 2018

A. Scope of Application

The CCPA grants "consumers"—defined as California residents—a number of rights related to the collection and use of their personal information.[10] To ensure compliance with these provisions, the CCPA imposes a host of compliance obligations on regulated "businesses"—for-profit entities that collect personal information, conduct business in California, and meet certain threshold revenue or information collection requirements.

B. Expansive Definition of "Personal Information"

"Personal information" is defined very broadly for purposes of the CCPA—virtually any information that can reasonably be linked with an individual or

[10] CCPA at §§ 1798.100-1798.125 (granting consumers the right to request access to and disclosure and deletion of certain types of personal information, a right to opt out of the sale of personal information, and a right of nondiscrimination).

household is arguably personal information.[11] That definition sweeps in not only information that is reasonably linkable to a consumer or the consumer's household, but also "[i]nferences drawn from any of the information identified in this subdivision to create a profile about a consumer . . ."[12] The ambiguity of "inferences" and "household" information as "personal information" presents massive logistical and IT process complications for businesses. For many mid-size, consumer-focused companies, determining how to address these requirements will be daunting.

C. The California Attorney General's Civil Enforcement Authority

The Attorney General may seek civil penalties of $2,500 "for each violation" and $7,500 "for each intentional violation."[13] The availability of per-violation penalties creates a substantial risk that companies may subject themselves to enormous liability for procedural missteps that impact large numbers of customers, even if they cause minimal or no actual harm. Historically, the staff in the Attorney General's office in California has aggressively interpreted "violations" of California law in its investigations. It seems likely given statements by the current Attorney General that this historical trend will continue or even be amplified. As a result, the potential penalties could easily present substantial and material risks for many enterprises.

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[11] *Id.* at §§ 1798.140(o) (defining "personal information").

[12] *Id.*

[13] *Id.* at § 1798.155.

D. Private Right of Action

In addition to civil enforcement by the California Attorney General, the CCPA creates a limited private right of action for consumers whose "nonencrypted or nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure" due to a business's "unreasonable" security practices.[14] The private right of action was substantially narrowed during negotiations with the business community prior to unanimous passage of the statute. A private right of action with statutory damages for data breaches is a game-changing development. This provision makes California an even friendlier haven for consumer class action litigation. Businesses that experience data breaches can anticipate a wave of sweeping new strike suits with nearly every data breach.

E. Possible Amendments on the Horizon for 2019

Multiple CCPA amendment bills have been introduced this year. Most notably, California Attorney General Xavier Becerra has advocated amending the CCPA to expand the private-right-of-action provision. The amendment would also limit regulated businesses' opportunities to cure alleged violations prior to enforcement and consult the Attorney General regarding compliance.[15]

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[14] *Id.* at § 1798.150.

[15] Press release, "Attorney General Becerra, Senator Jackson Introduce Legislation to Strengthen, Clarify California Consumer Privacy Act," (Feb. 29, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-senator-jackson-introduce-legislation-strengthen (last visited Mar. 19, 2019) (announcing proposed CCPA amendments).

II. KEY ISSUES TO BE ADDRESSED THROUGH RULEMAKING

The State Legislature has left several key issues to be hammered out through an administrative rulemaking process. Among other items, the CCPA tasks the Attorney General with the following:

- Establishing rules and procedures to facilitate consumer opt-out requests, govern compliance with opt-out requests, and to enable consumers to lawfully opt out of the sale of personal information on other consumers' behalf;[16]

- Defining the methods for submitting and verifying consumer requests to exercise the rights granted in the CCPA;[17]

- Identifying the "categories of personal information" necessary for businesses to comply with many consumer rights requests;[18]

- "[E]stablishing rules and guidelines regarding financial incentive offerings" that businesses may offer consumers in exchange for the collection of personal information;[19]

- Adopting any additional regulations "as necessary to further the purposes of this title."[20]

Many of these items are crucial to businesses' current efforts to prepare for CCPA compliance in 2020. Yet the proposed regulations will not likely be announced, let alone adopted, before the second half of 2019. In light of the brief window between the likely conclusion of the rulemaking process and the effective

[16] CCPA at §§ 1798.135(c); 1798.185(a)(4).

[17] *Id.* at §§ 1798.140 (i), (y); 1798.185(a)(7).

[18] *Id.* at § 1798.185(a)(1).

[19] *Id.* at § 1798.185(a)(6).

[20] *Id.* at § 1798.185(b).

date of the CCPA, affected entities should carefully monitor the rulemaking process. In addition to monitoring, timely, appropriate participation may enable concerned businesses to provide the Attorney General with valuable input that will aid his crafting of sensible compliance standards. Additionally, active participation may also help build a record enabling the business community to better defend investigations, class action litigation and to oppose the law and implementing regulations in court if appropriate.

III. STEP-BY-STEP EXPLANATION OF THE ANTICIPATED CCPA RULEMAKING PROCESS

The Attorney General informally solicited public comment earlier this year through a series of preliminary public forums.[21] These preliminary hearings should not be confused with the formal rulemaking, which the Attorney General's office has indicated will begin sometime in the fall of 2019.[22]

The California Administrative Procedure Act (California APA), which is administered by the California Office of Administrative Law (OAL), describes the notice-and-comment rulemaking process that will be followed by the California Attorney General.[23]

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[21] "California Consumer Privacy Act," https://oag.ca.gov/privacy/ccpa (last visited Apr. 11, 2019) (announcing preliminary public forums).

[22] *Understanding the Rights, Protections, and Obligations Established by the California Consumer Privacy Act of 2018: Where should California go from here?: Hearing Before the Standing Comm. on Privacy and Consumer Prot.*, Cal. State Assembly 2019-2020 Sess. (Cal. 2019) (testimony of Stacey Schesser, Supervising Deputy Attorney General, California Department of Justice).

[23] Cal. Gov't Code § 11340 *et seq.*

A. Initial Publications Issued by the California Attorney General

Under the California APA, the CCPA rulemaking must begin with the publication of four items in the California Regulatory Notice Register and on the website of the Attorney General:

- A Notice of Proposed Action, which must contain, among other specific contents, the deadline for submitting written comments and the times, dates, and locations of public hearings;[24]
- The text of the Attorney Generals' proposed CCPA regulations;[25]
- An initial statement of reasons identifying the problems being addressed through the proposed regulations, the purpose and necessity of the proposed changes, and the factual material relied upon;[26]
- An economic impact assessment that analyzes "the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements" or a more detailed Standardized Regulatory Impact Assessment (SRIA).[27]

B. Comment Period of at Least 45 Days Begins when Initial Publications Are Made

Publication of the Notice of Proposed Action and accompanying documents automatically initiates a written comment period of at least 45 days.[28]

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[24] *Id.* at §§ 11346.4-11346.5.

[25] *Id.* at § 11346.2.

[26] *Id.*

[27] *Id.* at § 11346.3.

[28] *Id.* at §§ 11346.4; 11346.8.

C. Public Hearings May Be Announced, and Must Be Held if Properly Requested

One or more public hearings are likely to be announced in the Notice of Proposed Action; if not, interested persons may submit written requests for a public hearing no later than 15 days prior to the close of the comment period.[29] If properly requested, "a public hearing shall be held."[30]

D. The California Attorney General Must Issue a Final Statement of Reasons (FSOR) Addressing All Comments

After all comments are submitted, the Attorney General must consider all relevant, timely comments and issue a FSOR responding to all such comments.[31] The FSOR must also address any changes made in response to comments it has received.

E. An Additional Notice-and-Comment Opportunity May Be Required if Substantial Changes Are Made to the Proposed Regulations

Depending on the nature of any post-comment period revisions to the proposed regulations, an additional notice-and-comment period may be required.[32]

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[29] *Id.* at § 11346.8.

[30] *Id.*

[31] *Id.* at §§ 11346.9-11346.9.

[32] *Id.* at § 11346.8.

F. The OAL Must Review the Proposed Regulations and the Rulemaking Record

After the comment and revision processes are completed, the proposed regulation text and the full rulemaking record are submitted to the OAL for independent review; the OAL thereafter has 30 days to review the draft regulations and the record for procedural compliance and for the following issues:

- Necessity – a regulation must be necessary to effectuate the purpose of the statute that it implements;[33]
- Authority – the Attorney General may not issue regulations inconsistent with its legal authority;[34]
- Clarity;[35]
- Consistency with other laws and regulations;[36]
- Adequate textual references to enabling legislation;[37] and
- Non-duplication – a regulation may not simply duplicate an existing statute or regulation.[38]

G. Final Regulations are Published by the California Secretary of State's Office

After it reviews the final regulations, the OAL files the final text with the Secretary of State's Office for publication.[39]

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[33] *Id.* at § 11349.1(a).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

IV. CONSIDERATIONS FOR PARTICIPATING IN THE CCPA RULEMAKING PROCESS

Businesses concerned about the CCPA have two primary avenues of participation: (1) submitting a written comment during the mandatory written comment period; and (2) participating in public hearings.[40]

Effective participation can contribute to the broader rulemaking process by:

- Ensuring due consideration is given to the CCPA's liability impact and compliance costs;
- Building a record of concern for compliance that may enable the business community to defend investigations and class action lawsuits or, for those inclined to do so, to oppose problematic aspects of the law and implementing regulations in court; and
- Aiding in crafting procedures consistent with the CCPA's privacy mandates.

The following is a list of key considerations for crafting effective comments:

- **The California Attorney General's notice of proposed action may offer important insight into the possible business impact of the proposed regulations.**

A Notice of Proposed Action contains over 30 mandatory and optional parts and subparts, many of which are required to address the proposed

[39] *Id.* at § 11349.3.

[40] *Id.* at § 11346.8.

regulations' likely impact on businesses.[41] Of particular note, the notice must include:

- An initial determination whether the proposed regulations will "have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with business in other states";[42] and
- A description of the cost impact that businesses "would necessarily incur in reasonable compliance with the proposed action."[43]

➢ **The California Attorney General's Economic Impact Assessment (SRIA) will provide further economic and business-related insight**.

Among other factors, an economic impact assessment would be required to address the extent to which the proposed regulations will impact:

- In-state job creation;[44]
- New business creation;[45] and
- Small businesses;[46]

A more detailed SRIA, if required, would address some of the same factors as an economic impact assessment, but would add additional factors, such as:

- The "competitive advantage or disadvantages for businesses currently doing business within the state";[47]

[41] *Id.* at § 11346.5.

[42] *Id.* at § 11346.5(a)(7)-(8).

[43] *Id.*

[44] *Id.* at § 11349.3(b).

[45] *Id.*

[46] *Id.*

[47] *Id.* at § 11349.3(c).

- "The increase or decrease of investment in the state";[48] and
- "The incentives for innovation in products, materials, or processes."[49]

➢ **The California Attorney General is bound by the rulemaking authority conferred by the CCPA and is not entitled to *Chevron*-style[50] deference in interpreting enabling legislation**.

Following the notice-and-comment portion of the rulemaking process, the OAL reviews all proposed regulations to ensure that they are consistent with the rulemaking power conferred by the State Legislature—in this case, the CCPA. This is an important California constitutional safeguard. Under the California APA, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."[51]

Likewise, California courts, unlike federal courts, generally do not defer to state agencies' interpretations of their own enabling statutes.[52] The Attorney General therefore must be careful not to exceed the rulemaking authority granted by the statute. Otherwise, the validity of its regulations may be challenged by means of a declaratory judgment action.[53]

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[48] *Id.*

[49] *Id.*

[50] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (articulating the doctrine of *Chevron* deference).

[51] Cal. Gov't Code § 11342.2

[52] *Yamaha Corp. of America v. State Bd. of Equal.*, 19 Cal. 4th 1, 11 n.4 (Cal. 1998).

[53] Cal. Gov't Code § 11350.

- **The California Attorney General must respond to relevant comments and justify its proposed rules against alternative recommendations**.

Rulemaking proceedings conclude after the OAL reviews the final proposed regulatory text and the rulemaking record.[54] As a necessary part of that record, the Attorney General's FSOR must summarize "each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change."[55] The FSOR must also include an affirmative finding that "no alternative considered by the [Attorney General] would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law."[56]

- **Submitted comments must be "relevant" to the California Attorney General's specific regulatory proposals, not the CCPA in general**.

Crucial to effective participation in the process is the submission of "relevant" comments. While required in its FSOR to respond to every comment that has been received during the formal rulemaking process, the Attorney General may "aggregate and summarize repetitive or irrelevant comments as a

[54] *Id.* at § 11349.3.

[55] *Id.* at § 11346.9(a)(3).

[56] *Id.* at § 11346.9(a)(4).

group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group."[57] A comment is "'irrelevant' if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action."[58]

Thus, although businesses may be concerned about any number of issues related to the CCPA, it is important in the rulemaking context for comments to be properly focused.

CONCLUSION

Given the significance of California to the United States' economy, the prevalence and frequency of consumer class action litigation in the jurisdiction, and the depth and breadth of potential liability—potentially billions of dollars of fines and damages—the CCPA rulemaking proceeding is a critically important new risk area worthy of the close attention and scrutiny by the business community.

[57] *Id.* at § 11346.9.

[58] *Id.*