



Hogan
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CCPA Modified Regulations: *Key Changes*

February 20, 2020

California Attorney Modified Proposed Regulations

- On February 7 (and 10), AG published modified draft regulations
- Draft regulations still subject to change
 - Final regulations expected to be published by CCPA’s July 1, 2020 enforcement deadline
- California Office of Administrative Law (OAL) will need to approve final regulations, affecting effective date of the regulations:
 - April 1 (if approved by the OAL before 2/29/20)
 - July 1 (if approved by the OAL between 3/1/20 and 5/31/20); or
 - October 1 (if approved by the OAL between 6/1/20 and 8/31/20).
- Comments due to the AG by February 25, 5:00pm (PST)

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Article 1:
Definitions

Definitions

Clarifications and Guidance

- Updated Definition of **Household**:
 1. Reside at the same address;
 2. Share a common device or the same service provided by a business; **and**
 3. Are identified by the business as sharing the same group account or unique identifier.
- New definition of **Employment-related information**:
 - Personal information collected for purposes described in the CCPA’s “employee” exemption.
 - Collection of employment-related information is a business purpose.
- Scope of CCPA **Personal Information**:
 - Excludes information that a business cannot reasonably use to identify an individual or household.
 - *E.g.*, IP addresses not linked to any particular consumer or household are not personal information.

Article 2: Notices to Consumers



Types of Notices

Types of Notice

1. Pre-collection notice (“at or before” point of collection)
2. Notice of the right to opt-out of sale of personal information
3. Notice of financial incentive
4. The privacy policy

Key Principles for Notice

1. Easy to read and understandable
2. Plain, straightforward language and avoid technical or legal jargon
3. Be available in the languages in which the business interacts with consumers in CA
4. Be accessible to consumers with disabilities (using industry standards)

Notices

Type of Notice	Key Changes
Pre-Collection Notice	<ul style="list-style-type: none"> PI collection from mobile device for a purpose the consumer would not reasonably expect requires just-in-time notice. Obtain consent for new purposes not disclosed at time of collection only if “materially different” than the purposes disclosed at collection. No longer need to specify the business or commercial purpose for which each category of PI collected will be used.
Notice of Right to Opt-out	<ul style="list-style-type: none"> No longer required to promise to refrain future PI sales in order to be exempt from providing notice of the sale opt-out right. No longer required to specify what proof is required when a consumer uses an authorized agent. Obtain affirmative authorization from consumers before selling PI that was collected before opt-out notice was published.
Notice of Financial Incentives	<ul style="list-style-type: none"> Include a disclosure of the value of the consumer’s data in the notice of financial incentive. No need to provide notice of financial incentive if not offering financial incentives, price differences, or service differences related to disclosure, deletion, or sale of PI.

Opt-Out Button

- The AG has created an optional opt-out button that businesses may use in conjunction with a DNSMPI link
 - Must also publish separate notice of opt-out right
 - Must link to webpage containing information about right to opt-out (*e.g.*, privacy policy)
 - Button must appear to the left of required text (see below)

 Do Not Sell My Personal Information

 Do Not Sell My Info

Privacy Policies

- Follow generally recognized industry standards for accessibility (*e.g.*, WWWC guidelines)
- No need to provide descriptions related to data collection and sharing practices *by category of PI* (except for third parties to whom PI is disclosed/sold)
- State whether the business sells PI but no longer scoped to past 12 months
- Must disclose whether the business has actual knowledge that it sells PI of minors under 16

An aerial photograph of a dense forest with a road cutting through it. The trees are mostly green, with some yellowing, suggesting early autumn. A road with a white line runs horizontally across the middle of the image. A dark green, semi-transparent rectangular box is overlaid on the left side of the image, containing white text.

Article 3: Business Practices for Handling Consumer Requests

Accepting Requests to Know or Delete

- Operating exclusively online with direct relationship with consumer then email address only acceptable for requests to know
 - Other businesses: two or more methods for requests to know.
 - All businesses: two or more methods for requests to delete.
 - “Webform” no longer explicitly required even for businesses operating a website.
- Consider how you interact with consumer: *e.g.*, in-person method for submitting requests for in-person interactions
 - Removed express requirement to have an online method for rights requests if not interacting directly with consumers.
- Requests to delete: two-step process of request then confirmation now permissive instead of required

Responding to Requests to Know or Delete

- Acknowledge receipt within 10 **business** days describing how business will process request
 - Respond to request within 45 **calendar** days; maximum total of 90 **calendar** days if extension is needed.
 - Unable to verify in 45 days then business can deny request.
- Absent password protected account, must not respond to household request for specific pieces of PI or deletion unless:
 - All consumers of the household jointly make request;
 - Business individually verifies all members of the household; **and**
 - Business verifies that each requestor is currently a member of the household.

Responding to Requests to Know

Requests for Categories or Specific Pieces of Personal Information

- Need not search for PI if all conditions are met:
 - PI not maintained in a searchable or reasonably accessible format;
 - Maintain PI solely for legal or compliance purposes;
 - No sales of PI and no use for any commercial purpose; **and**
 - Describe to consumer the categories of records that may contain PI but were not searched.
- For requests to know categories of PI, no longer need to provide for each category the categories of sources or purposes (except there still is requirement for each category of PI to disclose third parties to whom PI is disclosed/sold)

Responding to Requests to Know

Requests for Specific Pieces of Personal Information

- May no longer refuse to provide specific pieces of PI on the grounds that the disclosure poses security risks
- Need not disclose reason for refusing request if prohibited by law
- New prohibition on disclosing “Unique biometric data generated from measurements or technical analysis of human characteristics”

Responding to Requests to Delete

- Unverified deletion request – can deny
 - Not required to treat unverifiable deletion request as sale opt-out;
 - But, must ask the consumer if they want to opt-out of sale and provide information on how to do so.
- No longer required to specify deletion method to consumer
 - But, must business must inform consumer whether request has been honored.
- Retained exception for PI on archived/backup systems but clarifies when exception ends
- May retain a record of deletion request to ensure PI remains deleted
 - Appears tied to back-up issue.

Service Providers

- Service providers expressly prohibited from retaining, using, or disclosing PI obtained in the course of providing services except:
 - To perform services specified in the written contract with the business that provided the personal information;
 - To retain and employ another service provider as a subcontractor, where the subcontractor meets the requirements for a service provider under the CCPA and these regulations;
 - For internal use by the service provider to build or improve the quality of its services, provided that the use does not include building or modifying household or consumer profiles, or cleaning or augmenting data acquired from another source;
 - To detect security incidents, or protect against fraudulent or illegal activity; or
 - For purpose exempted from CCPA (1798.145(a)(1)-(4)) (e.g., compliance with law).
- Prohibited from selling data if a consumer has opted out of sales with the business
- Must either act on behalf of the business in responding to rights requests from a consumer or notify the consumer that it cannot respond to the request because it is a service provider

Requests to Opt-Out

- Complicated opt-out mechanisms discouraged
- Must comply with requests to opt-out within 15 business days
- Notify third parties and direct them not to further sell the consumer's PI if business has sold the PI after consumer submitted an opt-out, but before the business has complied with it
- Authorized agents may submit opt-out requests on behalf of consumers only if the consumer provides the agent written permission that is signed by the consumer

Training & Recordkeeping

- “Reasonable security procedures and practices” required when maintaining CCPA records
- May use CCPA records as “reasonably necessary” for compliance with the CCPA
 - May not share CCPA records with third party.
- Threshold for businesses who must compile and disclose metrics concerning personal information they collect raised to 10 million+ consumers

Article 4: Verification of Requests



General Rules for Verification

Collection of Additional PI for Verification

- Prohibition on requiring consumers to pay fees for verification of requests
 - (*E.g.*, cannot require consumer to provide a notarized affidavit as part of the verification process unless the business compensates the consumer for the cost of notarization.)

Verification for Non-Accountholders

Clarification of Example Verification Scenarios

- New example verification method for businesses that do not maintain personal information with consumer names
 - Verify consumers with “information that only the person who used the mobile application may know” or by requiring the consumer to respond to a notification sent to the relevant device.

Authorized Agents

Confirmation of Authorization

- May require consumer who submits request through agent to “directly confirm with the business” that the agent is authorized to submit the request

New Obligations for Agents

- Implement and maintain reasonable security procedures and practices to protect PI
- Prohibited from using PI, or any information collected from or about the consumer, for any purpose other than to fulfill the consumer’s requests, for verification, or for fraud prevention

A large number of colorful hot air balloons are floating in a clear blue sky. The balloons are scattered across the frame, with some larger and more prominent than others. The colors of the balloons include red, yellow, purple, blue, and white. The sky is a uniform light blue, and the overall scene is bright and clear.

Article 5: Special Rules Regarding Minors

Sales Involving Minors

Children under 13

- Parental Opt-in Mechanism
 - Businesses need only establish a method for obtaining verifiable parental consent to sell PI if actually selling PI of children under 13.
- Parental Consent Methods
 - Methods for obtaining parental consent include, but are not limited to, COPPA-provided methods.
- Parental Request Mechanism
 - Must use “reasonable method” for determining whether person submitting a child under 13’s request is the child’s parent/guardian.

Minors 13-16 Years of Age

- Opt-in Mechanism
 - Businesses need only obtain consent to sell if actually selling PI of children 13-16.



Article 6:
Non-Discrimination

Discriminatory Practices

- Prohibited from offering a financial incentive or price/service difference if:
 - Unable to calculate a good-faith estimate of the value of the consumer’s data; or
 - Show that the incentive or price/service difference is “reasonably related” to the value of the consumer’s PI.
- New examples of “discriminatory” practices
- Price/service differences required by federal law
 - A new exception clarifies that a price or service difference that is the “direct result” of compliance with federal law is not considered discriminatory under the CCPA.



What to Expect—
July 1, 2020
Enforcement
Deadline

Next Draft of Regulations

Likely to be fewer (if any) changes

- The first round of notice-and-comment raised a plethora of issues
 - At this time, it seems unlikely that the AG would address issues not taken up during the last round
- Timing constraints also weigh against additional significant changes
 - The AG likely wants to finalize the regulations soon so that they can be effective by July 1 (start of enforcement)
 - Technical changes seem more likely than substantive changes, if any
- Greater opportunity for impactful comment on new provisions or substantially updated provisions

Areas of Focus for Comments

Issues of First Impression

- Guidance on “personal information”
 - When to exclude IP addresses and other unique IDs
- Just-in-time notices for mobile devices
- Guidance on accessibility standards

Material Changes for Clarification

- Notice requirements for businesses that do not directly collect personal information, including data brokers
- Exemption from exhaustive record searches
- Clarification of service providers’ use of personal information
- Additional explanations of user-enabled privacy controls

Questions?



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