

January 2020: Survey of Fortune 500 Companies' Privacy Representations

David Zetoony

Partner, Co-Chair Global Data Privacy and Security Team



Introduction

With the enactment of the European General Data Protection Regulation (“GDPR”) and the California Consumer Privacy Act (“CCPA”), companies have been forced to cope with a shifting privacy landscape that impacts the data that they collect online and offline from customers, visitors, and employees. In the context of the CCPA, poor drafting, combined with a lack of practical regulatory guidance and the prospect of imminent judicial challenges, make it a particularly difficult statute for compliance.

At BCLP we have the honor to represent companies across a wide cross-section of industries including B2B, B2C, SaaS, retail, e-commerce, manufacturing, pharmaceuticals, and agricultural. Given our unique position in the market, we believe that we have an obligation to provide our clients – and the privacy community as a whole – with accurate benchmarking to help them make informed compliance decisions.

To help identify trends, BCLP randomly sampled 10% of the Fortune 500. The metrics provided in this report reflect the public disclosure of corporate privacy practices with a specific focus on CCPA requirements.

Sincerely,

A handwritten signature in black ink, appearing to read 'DZ', written over a light blue horizontal line.

David Zetoony
Co-Chair Global Data Privacy and Security Team
Bryan Cave Leighton Paisner LLP

Contents

Introduction	1
Executive Summary.....	2
Section 1: Age of Privacy Notices.....	3
Section 2: Size of Privacy Notices	3
Section 3: Percentage of Privacy Notices Updated for CCPA	3
Section 4: Disclosure by “Enumerated Category”	4
Section 5: Disclosure of Selling Practices.....	5
Section 6: Do Not Sell Option Link	6
Section 7: Data Subject Rights (e.g., Access and Deletion)	8
Section 8: Cookie Banners and Notices	8
Methodology.....	11
About the Author	12

Executive Summary

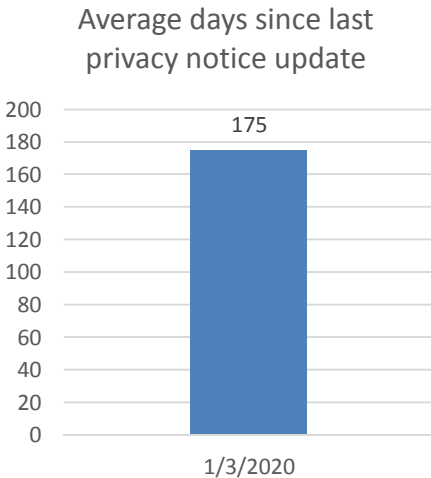
To help identify trends in privacy representations, BCLP randomly sampled the websites and privacy notices of 10% of the Fortune 500 companies.

The data shows that there is no one strategy for disclosing privacy practices to consumers, or for complying with federal and state laws – including the CCPA – that govern data privacy. The following summarizes current industry trends:

- Privacy notices are, on average, less than six months old.
- The majority of companies have updated their privacy notices for the CCPA.
- Privacy notices that reference enumerated categories are predominantly using tables to convey information.
- The majority of companies state that they do not sell personal information.
- 30% of privacy notices are silent or unclear about selling practices.
- The vast majority of privacy notices do not include a “Do Not Sell” option.
- Those companies that are disclosing the sale of information are complying with the CCPA’s requirement to provide a “Do Not Sell” option.
- No single standard has emerged for effectuating a “Do Not Sell request.”
- Most companies offer access and deletion rights.
- The average quantity of behavioral advertising cookies on a corporate homepage is 8.1.
- Most companies are not deploying a cookie notice or banner.
- Those that do are split in terms of whether to use an opt-in, notice, or deemed consent banner.
- Most companies that use behavioral advertising cookies do not consider themselves to have sold information.

Section 1: Age of Privacy Notices

Companies routinely update their privacy notices to account for new legal requirements, changes in business practices, and changes in industry standards and practices. The average age of a privacy notice indicates the number of days since the notice was last updated:



Privacy notices are, on average, less than six months old.

Section 2: Size of Privacy Notices

Privacy notices differ in complexity and size. While longer privacy notices may provide more information concerning privacy practices, they can inadvertently make it more difficult for a reader to understand privacy practices if the reader does not have the time to fully review the notice. The following indicates the size of privacy notices:¹

Longest Privacy Notice	Shortest Privacy Notice	Average Size
10,986 words (43 pages)	88 words (0.5 pages)	3912 words (15.5 pages)

Section 3: Percentage of Privacy Notices Updated for CCPA

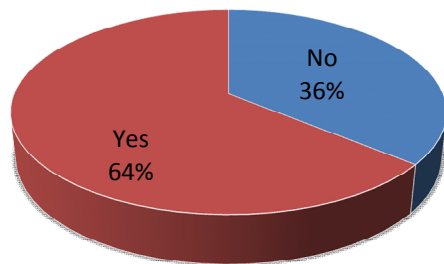
A privacy notice (sometimes referred to as a “privacy policy” or an “information notice”) is a document published by a company that includes, among other things, a description of what types of personal information the company collects, how the company uses that information, and with whom the company shares information. While most companies historically maintained an online privacy notice, the CCPA requires companies to provide a privacy notice to all California residents about whom they collect information (e.g., in-store and online), and to include specific provisions within the privacy notice including:

¹ Page count is based upon the average of 250 words per page using double-spaced lines.

- A list of the “enumerated categories” of personal information collected by the company;
- A list of the “enumerated categories” of personal information shared by the company with third parties for business purposes;
- A disclosure about whether personal information is “sold” by the company;
- Disclosures concerning the rights of Californians to access, delete, or object to the sale of their personal information; and
- Methods for submitting such requests.

The following indicates the percentage of companies that, as of the time of publication, had updated their privacy notices to attempt to account for the requirements of the CCPA.

Has the company privacy notice been updated for the CCPA?



The majority of companies have updated their privacy notices for the CCPA.

Section 4: Disclosure by “Enumerated Category”

The CCPA states that a company should provide within its privacy notice lists of the categories of personal information that it has collected,² sold,³ and disclosed⁴ for business purposes. The statute also states that those lists should refer to the “enumerated category or categories” of “personal information” referenced within the statute.⁵ The term “enumerated category” refers to a list of specific data fields identified within the CCPA. The following indicates the percentage of companies that, as of the time of publication, had disclosed – via a list or a chart – the “enumerated categories” identified within the CCPA:

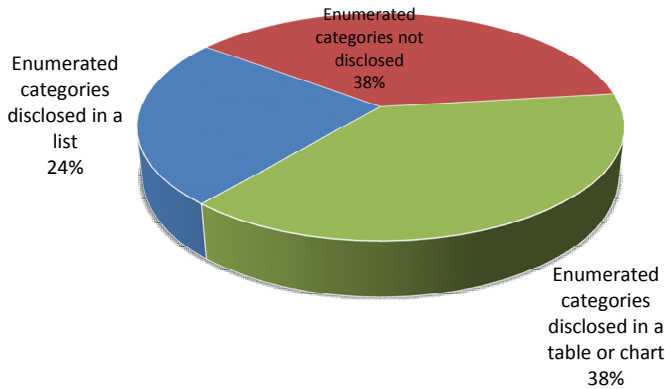
² [Cal. Civil Code 1798.130\(a\)\(5\)\(B\).](#)

³ [Cal. Civil Code 1798.130\(a\)\(5\)\(C\)\(i\).](#)

⁴ [Cal. Civil Code 1798.130\(a\)\(5\)\(C\)\(ii\).](#)

⁵ [Cal. Civil Code 1798.130\(c\); Cal. Civil Code 1798.140\(o\)\(1\).](#)

Disclosure by "Enumerated Category"

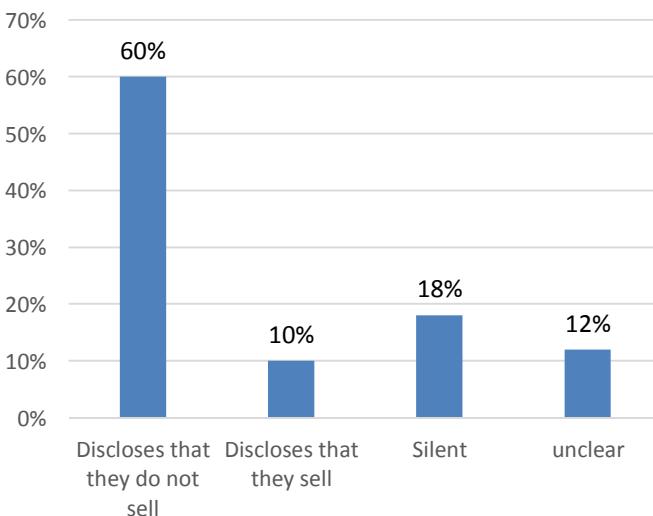


Privacy notices that reference enumerated categories are predominantly using tables to convey information.

Section 5: Disclosure of Selling Practices

The CCPA requires that a company affirmatively state whether it does, or does not, “sell” information. The term “sell” is broadly defined under the statute to include more than transferring personal information in return for payment. It includes “disclosing, disseminating, making available, transferring, or otherwise communicating” personal information “to another business or a third party for monetary or other valuable consideration.”⁶ The CCPA’s broad definition in combination with ambiguity concerning what courts will consider as “valuable consideration,” has led to uncertainty among companies concerning the types of information sharing that might be considered a “sale” under the statute.⁷ The following indicates the percentage of companies that, as of the time of publication, disclosed that they “sell” personal information:

Disclosure of sale of Personal Information



The majority of companies state that they do not sell personal information.

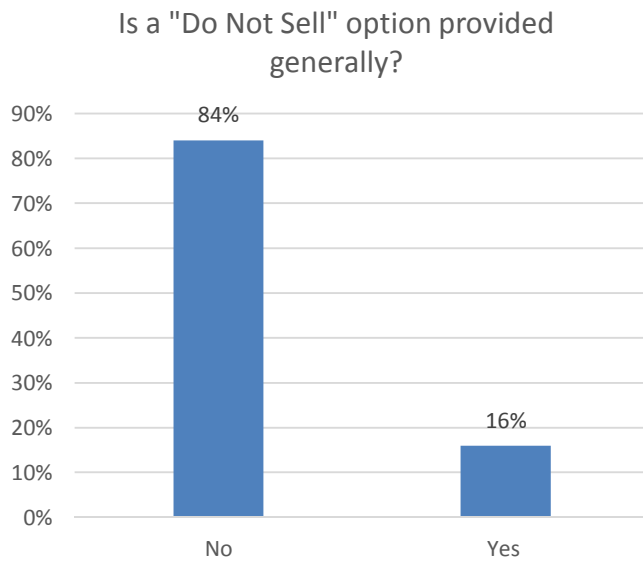
30% of privacy notices are silent or unclear about selling practices.

⁶ [Cal. Civil Code 1798.140\(t\)\(1\).](#)

⁷ [Cal. Civil Code 1798.130\(c\); Cal. Civil Code 1798.140\(o\)\(1\).](#)

Section 6: Do Not Sell Option Link

The CCPA states that if a company sells personal information it must provide California residents with the ability to opt-out of the sale of the information, and that the opt-out should be accessible via a “Do Not Sell My Personal Information” link on the company’s homepages and in the company’s privacy notice.⁸ In other words, it must disclose to Californians that they have the “right to opt-out” and provide them a mechanism to do so. The following indicates the percentage of companies that provide Californians with some form of Do Not Sell option:

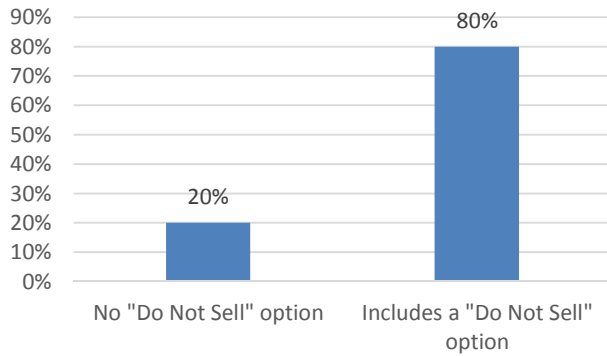


The vast majority of privacy notices do not include a “Do Not Sell” option.

Among the subset of companies that disclose that they do sell personal information the following indicates the percentage of companies that offer a “do not sell” option to Californians:

⁸ [Cal. Civil Code 1798.120\(a\), \(b\).](#)

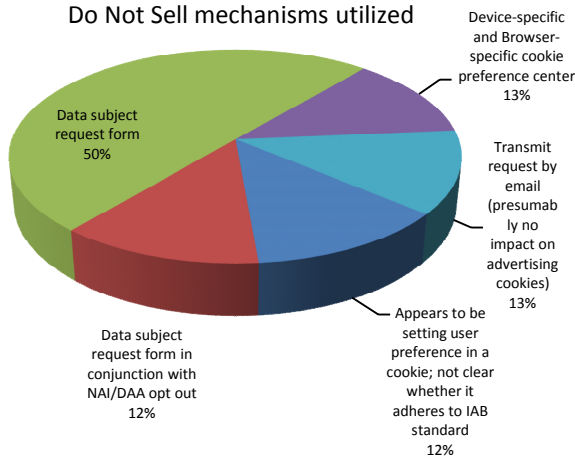
Among companies that disclose the sale of information, what percentage offer a "Do Not Sell" option?



Those companies that are disclosing the sale of information are complying with the CCPA's requirement to provide a "Do Not Sell" option.

For companies that disclose that they sell personal information and that offer a Do Not Sell option, the CCPA provides little guidance concerning how a Do Not Sell request should be effectuated. The following indicates the do not sell mechanism utilized by those companies that offer a do not sell option:

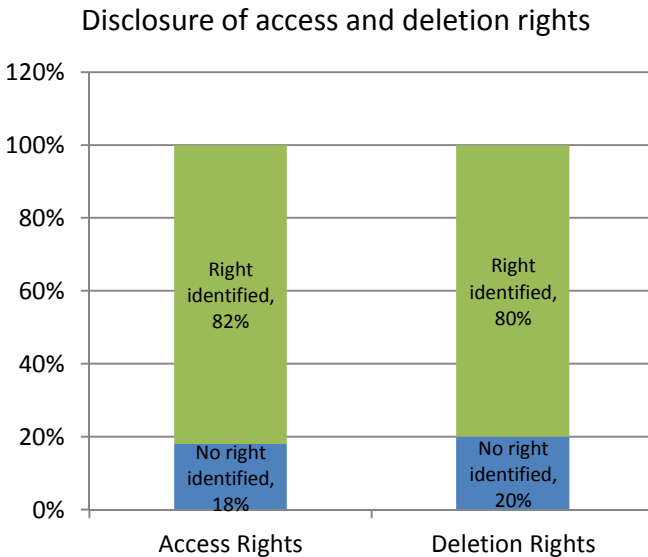
Among companies that offer a Do Not Sell option, the Do Not Sell mechanisms utilized



No single standard has emerged for effectuating a "Do Not Sell request."

Section 7: Data Subject Rights (e.g., Access and Deletion)

The CCPA gives Californians the ability to request that a company provide them with access to their personal information or that a company delete the information that it holds about them. The following indicates the percentage of companies that disclose access and deletion rights:



Most companies offer access and deletion rights.

Section 8: Cookie Banners and Notices

Many companies utilize cookies, pixels, tags, and other forms of tracking technologies provided by third parties to identify individuals that visit their website, and to advertise to them when they leave their website. There is ambiguity about whether permitting a third party behavioral advertiser to track California residents on a website does, or does not, constitute the “sale” of personal information under the CCPA. Companies have responded to that ambiguity in a variety of ways including, but not limited to:

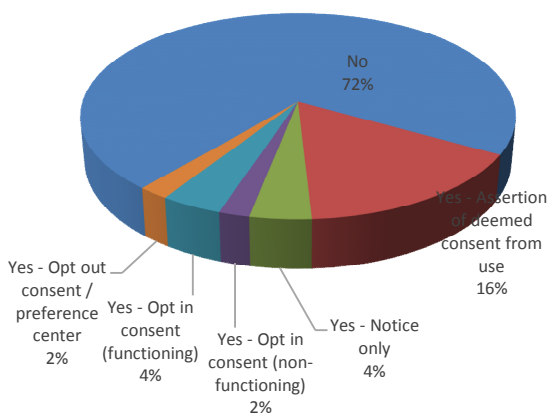
- Limiting their use of tracking technology to only third parties that agree to be “service providers” under the CCPA.
- Posting a notice on their website that asks California users to consent to the deployment of third party behavioral advertising technology (an “opt-in cookie notice”).
- Posting a notice on their website that informs California users about the use of third party behavioral advertising technology and provides California users the ability to opt-out of such use on a device-specific and browser-specific basis (an “opt-out cookie notice”).
- Posting no cookie notice, but treating the use of third party behavioral advertising cookies as the “sale” of information and permitting Californians to opt-out of such sales via a do not sell mechanism.

The following indicates the quantity of third party behavioral advertising cookies deployed on company homepages:

Greatest Quantity	Smallest Quantity	Average Quantity
40	0	8.1

The following indicates the percentage of companies that have posted a cookie notice on their homepage:

Deployment of Cookie Notice on homepage



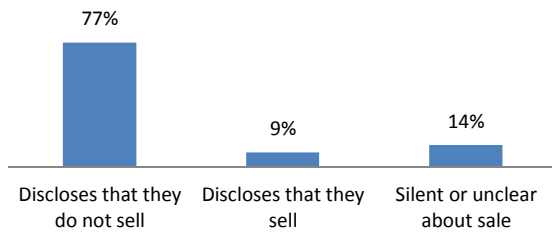
Most companies are not deploying a cookie notice or banner.

Those that do are split in terms of whether to use an opt-in, notice, or deemed consent banner.

Some privacy advocates have argued that the use of third party behavioral advertising cookies might be interpreted as constituting the “sale” of information. Other companies have argued that the use of third party behavioral advertising cookies does not constitute the “sale” of information. Whether the use of a particular cookie does, or does not, constitute the sale of information may depend, in part, upon the purpose of the cookie, the contractual terms under which it has been used, and the type of information that it collects. Among companies that have updated their privacy notices for the CCPA and place at least three behavioral advertising cookies on their website,⁹ the following reflects the number that have identified that they are “selling” information:

⁹ Behavioral advertising cookies were identified using Ghostery. The contract terms relating to cookies was not independently evaluated by BCLP to determine whether the cookie would, or would not, be classified as a “service provider” under the CCPA.

Disclosures of "sale" among companies that have updated their privacy notice for the CCPA, and use at least three advertising cookie, and do not solicit opt-in consent



Most companies that use behavioral advertising cookies do not consider themselves to have sold information.

Methodology

BCLP generated a report in December 2019 of the companies within the Fortune 500. A computer random number generator identified 10% of the total population (the “Survey Population”). The privacy notices and homepages of the Survey Population were examined on **January 2, 2020**, using Chrome for iOS Version 79.0.3945.88 (official build) (64 bit). Cookies were identified and classified as “advertising” using Ghostery for Chrome Version 8.4.4. All websites were visited from an IP address physically associated with Los Angeles, California.

Note that while this report identifies patterns and trends, it does not indicate what percentage of companies are in compliance with the CCPA. Strategies for compliance with the CCPA are fact intensive and require an examination of multiple factor in order to determine whether the Act applies to a company and, if so, what a company is required to do pursuant to the Act.

In situations in which a company had more than one privacy notice, the “online” privacy notice (if one was so described) was reviewed. If a California-specific privacy notice was provided, both the California notice and the general notice were reviewed. If a privacy notice indicated that it was updated in a month and a year (but no date was provided) the first date of the month was recorded as the “updated” unless a more precise date could be inferred.

About the Author



David A. Zetoony
Bryan Cave Leighton Paisner

Mr. Zetoony is a partner in the Boulder, Colorado, office of Bryan Cave Leighton Paisner, LLP, an international law firm. Mr. Zetoony co-leads the firm's global data privacy and security practice and represents companies around the world on data privacy and security issues. He has helped hundreds of companies design their strategy for CCPA and GDPR compliance.

Mr. Zetoony graduated *cum laude* with a dual degree in history and policy studies from Rice University in Houston, Texas and received his juris doctorate from the University of Virginia School of Law in Charlottesville, Virginia. He has served in various leadership roles within the privacy and data security community including as a co-chair for the Colorado chapter of the International Association of Privacy Professionals.

Mr. Zetoony frequently speaks and writes on issues of domestic and international data privacy and security law. He received a JD Supra Readers' Choice Award in 2017, 2018, and 2019, and has been repeatedly named as the top "thought leader" in data privacy by Lexology. He was named a Cybersecurity & Data Privacy Trailblazer by the National Law Journal in 2016. In addition to his data privacy and security practice, he has received several awards for his *pro bono* contributions including the Pro Bono Partner of the Year Award from the Catholic Charities of the Archdiocese of Washington, D.C., and the Commitment to Justice Award from the Central American Resource Center

Bryan Cave Leighton Paisner LLP
Boulder, Colorado
David.Zetoony@bclplaw.com
202-508-6030