

## California Governor Signs One of the Most Significant Data Privacy Statutes in the U.S.

It is likely that 2018 will be looked back upon as an inflection point with regard to privacy rights, ecommerce and the development of the internet. First, the Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”) was signed into law by President Trump, striking down many of the free speech protections websites had come to rely upon under Section 230 of the Communications Decency Act. Next, the European Union General Data Protection Regulation (“GDPR”) went into effect, imposing broad obligations on any company that collects personal information from European Union residents and empowering European consumers with new rights. And most recently, on June 28, 2018, the California Legislature passed the California Consumer Privacy Act of 2018 (“CCPA”), one of the most significant privacy rights statutes ever enacted in the United States.

The CCPA was signed into law by Gov. Brown the same day it passed and is scheduled to go into effect on January 1, 2020. The law expands the definition of Personal Information (“PI”), and requires companies to: (1) disclose additional information about the PI they collect and how they use and share it; (2) act on consumer requests to access, transport, and delete PI; (3) allow users to opt out of having their PI sold without discrimination; and (4) only sell PI from consumers under 16 with opt-in consent. Additionally, the law provides consumers with a private right of action to sue a company following the unauthorized disclosure of PI if the company failed to implement reasonable security procedures and practices.

The CCPA applies to businesses that make \$25 million or more in annual gross revenue; buy, receive, sell or share the PI of 50,000 or more consumers, households or devices for commercial purposes; or derive at least half of their revenue from the sale of consumer PI. Companies are technically only required to provide rights under the CCPA to California consumers, but given the nature of online commerce, it will impact companies worldwide.

In many ways, the CCPA is the first law of its kind in the United States and will require most companies to make changes to their online disclosures, policies and internal processes. Although there is an 18-month period before companies will be subject to the new law’s requirements, there is every reason to begin preparing now. As with the GDPR, which went into effect in May, delaying compliance efforts can result in increased costs, business disruption, and potentially complications with vendors and other third parties.

### **New Rights and Requirements Under the CCPA**

The CCPA makes a number of significant changes that both provide new rights for California consumers and impose obligations on companies that collect information from such consumers. Some of the most significant changes include:

- **More Expansive Definition of PI:** At the outset, the CCPA adopts a definition of PI that is more expansive than even the GDPR. Under the new law, PI 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.” This law expressly includes in this definition “IP addresses, persistent or probabilistic identifiers that can be used to identify a particular consumer or device, records of personal property, products or services purchased, obtained or considered, or other purchasing or consuming histories or tendencies;

Internet or other electronic network activity information, professional or employment-related information; or any consumer profile."

Not only does this definition include information that has traditionally been considered PI, but it expands CCPA obligations to companies that have largely been able to sidestep privacy laws. Notably, many internet service providers, advertising networks and app developers that previously relied on self-regulation may have to make significant changes to comply with the new law.

- **Additional Disclosures:** Building on the disclosure obligations under California's Shine the Light Law, the CCPA requires companies to provide consumers with additional details about how their information is collected, used and shared. Under the new law, companies must disclose the categories of: (1) PI that it collects; (2) sources from which it collects PI; (3) business purposes for collecting PI; and (4) third parties with which PI is shared. These disclosures must be provided at the point PI is collected or earlier, and the CCPA does not provide mechanisms for circumventing these disclosures, as is the case with the Shine the Light Law.
- **Consumer Right to Access, Transport, and Delete Their PI:** The CCPA grants rights to California consumers similar to those granted to European Union residents under the GDPR. Specifically, California consumers can request that companies provide them with access to and a copy of their PI in a "readily usable format" that will allow them to transport the information. Consumers are also entitled to request that a company delete their PI, subject to a number of exceptions. Under the CCPA, companies are required to facilitate such consumer requests, and in some cases, expressly inform consumers about these rights.
- **Consumer Opt-out Rights:** California consumers are also entitled to request that a company not sell their information to third parties under the CCPA. If a consumer opts out of having their information sold, companies are not allowed to discriminate against the individual for making that choice. However, while companies may not deny service, change price, or offer a different quality of goods or services if consumers do not permit the sale of their PI, the new law does allow some flexibility to offer incentives to entice individuals to permit the sale of their PI.
- **Limits on Collecting PI from Individuals Under 16:** Federal law currently sets strict limits on the collection of PI from individuals under 13. CCPA builds on these limits, prohibiting companies from collecting PI from individuals under 16 without opt-in consent. This change will have an especially significant impact on companies that target teenagers or have never previously had to grapple with age restrictions.
- **Private Right of Action for Unauthorized Disclosures:** Enforcement of the CCPA is primarily entrusted to the California attorney general, but the law does provide a private right of action for consumers under certain circumstances. The new law allows consumers to sue companies for the "unauthorized access and exfiltration, theft, or disclosure" of nonencrypted or nonredacted PI if a company failed in its duty to maintain reasonable security procedures and practices appropriate to the PI it is collecting.

### **Implications of the CCPA**

Challenges to the legality of the CCPA are already being formulated, and it is possible that at least certain provisions of the new law will be modified or struck down before 2020. Nevertheless, working toward compliance

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can benefit companies in multiple ways. Not only will it make future GDPR compliance efforts less painful, but it will allow companies to assure their customers, vendors and other third parties that they are complying with privacy best practices.

Compliance with the CCPA will mean different things for different companies. As with the GDPR, there is no “one-size-fits-all” approach. At a minimum, the law will require companies that interact with California consumers to update their privacy policies, provide additional disclosures when they collect information, and create back-end processes for responding to consumer requests under the CCPA. Additionally, companies will be required to reassess their risk of liability in the event of a security incident and analyze whether new categories of information that they collect will be classified as PI.

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